



1998

# Fine Art of Intimidating Disgruntled Beneficiaries with In Terrorem Clauses, The

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# THE FINE ART OF INTIMIDATING DISGRUNTLED BENEFICIARIES WITH *IN TERROREM* CLAUSES

*Gerry W. Beyer\**  
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## I. INTRODUCTION

SINCE people have had the privilege of naming the recipients of their bounty upon death, property owners have endeavored to encapsulate their property disposition desires in wills shielded from attack by dissatisfied heirs. Similarly, as the practice of transferring property via trusts gains in popularity, people are motivated to shelter trusts from costly challenges as well. One of the oldest of these protective tech-

niques is the *in terrorem* clause,<sup>1</sup> that is, a provision that voids gifts to beneficiaries who fail in their attempt to invalidate the instrument and seek to enlarge their shares by taking as heirs under the applicable intestacy statutes or under a prior dispositive instrument.

Under a typical *in terrorem* provision, the beneficiary is presented with a choice of either (1) accepting the gift under the will or trust, or (2) contesting the instrument with the hope of upsetting the testator's or settlor's intended disposition and, instead, receiving a greater share of property through intestacy, under a prior will, or via some other means, but with the concomitant risk of triggering a forfeiture of all benefits if the contest fails.<sup>2</sup> If the contestant successfully obstructs the probate of the testator's will or invalidates the trust, the *in terrorem* provision is disregarded because the entire instrument to which it is an integral part is nullified.<sup>3</sup> Conversely, if the contesting beneficiary fails to prove that the will or trust is invalid, the *in terrorem* provision is applied, and the contesting beneficiary will no longer be entitled to the gift.<sup>4</sup> In the majority

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1. In this Article, "no-contest" provisions are referred to as "*in terrorem*" clauses. However, this may be a misnomer, because historically, the party breaching the no-contest clause would pray to the court to find the clause to be "*in terrorem* only" or "merely *in terrorem*." See *Cooke v. Turner*, 15 M. & W. 727, 732, 153 Eng. Rep. 1044 (Ex. 1846) (citing *Cage v. Russel*, 2 Vent. 352, as the first case to hold that if an *in terrorem* clause provides that upon a breach the legacy is given over to the executor and not a stranger then the clause is treated as *in terrorem* merely, and not obligatory); *Morris v. Burroughs*, 1 Atk. 398, 404 (1737) (treating condition as *in terrorem* only if the clause does not provide for a gift over to a third party). The effect of such a finding by the court was that the clause would be considered a "threat only," and if breached, it would not cause a forfeiture. The early English cases followed this approach with bequests of personal property when the testator failed to provide a gift over, that is, to name an alternative beneficiary to take the bequest forfeited by the breaching party. Since the rejection of the English rule, however, which accorded a different treatment to devises of realty as opposed to bequests of personalty, the "*in terrorem* only" defense has vanished and the courts and scholars have used the terms "*in terrorem*" and "no-contest" interchangeably.

2. See *Kitchen v. Ballard*, 220 P. 301, 303 (Cal. 1923) (equating choice by beneficiary under *in terrorem* provision to that of ordinary decision arising from business transactions: "whether the thing offered is worth the price demanded"); *Schiffer v. Brenton*, 226 N.W. 253, 254-55 (Mich. 1929) (emphasizing choice by beneficiary to take devise under will or contest will and possibly lose and forfeit devise); *In re Estate of Seymour*, 600 P.2d 274, 276 (N.M. 1979) (noting that whenever a beneficiary challenges a will that includes an *in terrorem* provision the beneficiary does so while putting the testamentary gift in jeopardy); see also Jack Leavitt, *Scope and Effectiveness of No-Contest Clauses in Last Wills and Testaments*, 15 HAST. L.J. 45, 45 (1963) (discussing all or nothing gamble by beneficiary who contests will).

3. See THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 82, at 408 (2d ed. 1953) (commenting that *in terrorem* provision fails with entire instrument if contestant successfully challenges will); WILLIAM M. MCGOVERN, JR. ET AL., WILLS, TRUSTS AND ESTATES § 14.1, at 586 (1988) (noting that if will is found to be invalid upon contest, forfeiture provision fails with rest of will); see also RESTATEMENT (SECOND) OF PROPERTY § 9.1 (1983) (application results in beneficiary's interest passing as if *in terrorem* provision never existed if it is deemed ineffective). 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, 373 (1983) [hereinafter *Validity and Enforceability*] (identifying the most common grounds for contesting a will to be lack of testamentary capacity, undue influence, fraud, forgery, improper execution, or revocation by subsequent will).

4. See *In re Estate of Hartz*, 77 N.W.2d 169, 170 (Minn. 1956) (acknowledging that contestant who is unsuccessful in proving will invalid invokes forfeiture clause); *Rossi v.*

of jurisdictions throughout the United States, conditions prescribing forfeiture upon contest of an instrument by a beneficiary have been generally held valid, enforceable, and not against public policy.<sup>5</sup>

Although Texas courts have established the validity of *in terrorem* clauses in wills, the case law does not delineate the true extent of their enforceability. The first two cases, decided by separate Texas Courts of Appeals, strictly enforced *in terrorem* clauses.<sup>6</sup> Subsequent decisions, however, suggest that the forfeiture may not occur if the beneficiary brought the contest with probable cause and in good faith.<sup>7</sup> The Texas Supreme Court has yet to settle this issue. The inconsistent case law, coupled with the lack of any statutory authority, renders the effectiveness of utilizing an *in terrorem* clause unpredictable in Texas.

In Texas, as in most states, there is virtually no statutory law and very little case law addressing *in terrorem* clauses in inter vivos trusts.<sup>8</sup> Where a will pours over into an established trust, at least one court has refused to apply the *in terrorem* clause in the will to a contest directed at the

Davis, 133 S.W.2d 363, 372 (Mo. 1939) (noting that beneficiary has the choice to contest will and that if the contest fails, forfeiture of the devise occurs); *Seymour*, 600 P.2d at 278 (asserting that when a beneficiary contests will in face of an *in terrorem* clause, the beneficiary does so at peril of the bequest); *Elder v. Elder*, 120 A.2d 815, 819 (R.I. 1956) (stating that after devisee has unsuccessfully contested will forfeiture is mandatory). See generally ATKINSON, *supra* note 3, § 82, at 408-09 (identifying general rule that failure of contest invokes forfeiture under *in terrorem* provision).

5. See *Smithsonian Inst. v. Meech*, 169 U.S. 398, 415 (1898) (reviewing authorities and holding *in terrorem* provisions valid and consistent with good law and morals); *Lytle v. Zebold*, 357 S.W.2d 20, 21 (Ark. 1962) (upholding validity of forfeiture provisions because testator can choose to devise property to any beneficiary or refuse to devise to any beneficiary who attempts to thwart testator's intent); *Womble v. Gunter*, 95 S.E.2d 213, 216-18 (Va. 1956) (surveying authorities and holding *in terrorem* provisions consistent with public policy considerations of discouraging litigation, saving estate assets, and maintaining testator's intended distribution). See generally 5 WILLIAM J. BOWE & DOUGLAS H. PARKER, PAGE ON THE LAW OF WILLS § 44.29, at 469-72 (1962) (discussing authority on legality of prohibiting will contests); *Validity and Enforceability*, *supra* note 3, at 374 (identifying authority supporting the general rule that forfeiture provisions that eliminate bequest of contesting beneficiary are valid).

6. See *Massie v. Massie*, 118 S.W. 219, 219 (Tex. Civ. App. 1909, no writ); *Perry v. Rogers*, 114 S.W. 897, 899 (Tex. Civ. App. 1908, no writ).

7. See *Hammer v. Powers*, 819 S.W.2d 669, 673 (Tex. App.—Fort Worth 1991, no writ) (stating 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”); *Gunter v. Pogue*, 672 S.W.2d, 840, 843-44 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.) (surveying Texas case law concerning probable cause exception); *Hodge v. Ellis*, 268 S.W.2d 275, 287 (Tex. Civ. App.—Fort Worth 1954), *rev'd on other grounds*, 277 S.W.2d 900 (Tex. 1955) (discussing probable cause exception to forfeiture and quoting *Calvery* and *First Methodist* decisions); *First Methodist Episcopal Church South v. Anderson*, 110 S.W.2d 1177, 1184 (Tex. Civ. App.—Dallas 1937, writ dism'd) (citing *Calvery* and asserting that “the great weight of authorities sustain the rule” that forfeiture will be denied when contest is brought under probable cause); see also W. Harry Jack, *No-Contest or In Terrorem Clauses in Wills—Construction and Enforcement*, 19 Sw. L.J. 722, 729-31 (1965) (surveying Texas case law acknowledgement of probable cause exception).

8. See Jo Ann Engelhardt, *In Terrorem Inter Vivos: Terra Incognita*, 26 REAL PROP. PROB. & TR. J. 535, 542 (1991) (citing CALIF. PROB. CODE ANN. § 21300 (West 1991), which was originally applicable only to wills, but which now applies to any “instrument,” including trusts).

trust.<sup>9</sup> Consequently, the settlor or testator who wants to avoid contests should include an *in terrorem* clause in both instruments.<sup>10</sup> The reasons prompting a testator to include an *in terrorem* clause in a will apply equally to inter vivos trusts.<sup>11</sup> Further, both trusts and wills can be contested on grounds of undue influence and fraud. Although inter vivos trusts require far fewer formalities than a will and, subsequently, are less likely to be successfully attacked on such grounds, in some states the required capacity to execute an inter vivos trust is higher than that required for a will.<sup>12</sup> Therefore, a beneficiary of a trust may have a better chance of prevailing in a trust contest for lack of capacity as compared to a will contestant.<sup>13</sup>

Due to the great importance the law places on freedom of testation and the ability of people to dispose of their property as they see fit while alive, the courts should uphold the wishes of the donor, be it a testator or a settlor. *In terrorem* clauses represent one method of fulfilling a donor's clearly expressed intentions.<sup>14</sup> Because the great majority of will and trust contests are futile and result in the wasting of the donor's property, the courts should uphold *in terrorem* clauses to discourage needless, vexatious, and costly litigation.<sup>15</sup> Further, the courts recognize that "often, after the death of a testator, . . . 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."<sup>16</sup> Therefore, the courts also uphold *in terrorem* clauses to protect the privacy of the donor and prevent the public airing of the donor's private matters and family secrets.<sup>17</sup> Finally, *in terrorem* clauses may reduce the family animosity that often results from contests over the donor's capacity.<sup>18</sup>

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9. See *In re Lindstrom*, 236 Cal. Rptr. 376 (Cal. Ct. App. 1987) (construing *in terrorem* clause in pour over will as not applying to contest of the trust).

10. See 23 PHILLIP E. HECKERLING INSTITUTE ON ESTATE PLANNING ¶ 603.1(C)(2) (1989).

11. See Engelhardt, *supra* note 8, at 542 (noting the reasons to use an *in terrorem* clause in a trust include "to protect the grantor's wishes, to avoid litigation, or to place an absolute limit on a beneficiary's interest in assets").

12. See *id.*

13. See *id.*

14. See Martin D. Begleiter, *Anti-Contest Clauses: When You Care Enough to Send the Final Threat*, 26 ARIZ. ST. L.J. 629, 631 (1994). See, e.g., *Meech*, 169 U.S. at 415; *Burtman v. Burtman*, 85 A.2d 892, 895 (N.H. 1952); *Alper v. Alper*, 65 A.2d 737, 741 (N.J. 1949); *Dainton v. Watson*, 658 P.2d 79, 81 (Wyo. 1983).

15. See, e.g., *South Norwalk Trust Co. v. St. John*, 101 A. 961, 963 (Conn. 1917) (noting policy argument that *in terrorem* provisions prevent waste of estate assets through deterring long, drawn-out litigation and hindering exposure of family secrets); *Barry v. American Sec. & Trust Co.*, 135 F.2d 470, 473 (D.C. Cir. 1943); see also *Donegan v. Wade*, 70 Ala. 501, 504 (1881); *Seymour*, 600 P.2d at 278; Begleiter, *supra* note 14, at 631.

16. *Meech*, 169 U.S. at 415.

17. See *id.*; Begleiter, *supra* note 14, at 631.

18. See *Seymour*, 600 P.2d at 278 (discussing policy behind probable cause exception to protect estates from costly litigation and lessen chance of family animosities over testator's capacity and bequests).

Part I of this Article discusses the history and development of the *in terrorem* provision by presenting examples of precedent and actual *in terrorem* provisions utilized in ancient times, in England prior to the Norman Conquest, in early common law preceding the Statute of Wills, in modern common law, and in the earliest decisions of United States courts. Part II examines the four approaches courts and legislatures in the United States currently follow in evaluating *in terrorem* provisions. Part III focuses on the use and judicial treatment of *in terrorem* provisions in Texas, examines the validity of *in terrorem* provisions in the state, and exposes the uncertainty resulting from the reported opinions. Finally, Part IV addresses the need for legislative enactment of a comprehensive *in terrorem* statute in Texas and concludes with a proposed statute designed to provide predictability to the law of *in terrorem* provisions.

## II. THE HISTORY AND DEVELOPMENT OF THE *IN TERROREM* CLAUSE

### A. ANCIENT HISTORY

#### 1. *Biblical Account of Creation*

The Biblical account of creation documents the earliest use of threats to control behavior. After God created heaven, earth, and the living creatures, God planted the Garden of Eden. God then placed Adam in charge of Eden subject to the following *in terrorem* provision: "And the Lord God commanded the man thus, 'From every tree of the garden you may eat; but from the tree of the knowledge of good and evil you must not eat; for the day you eat of it, you must die.'"<sup>19</sup>

Despite the severity of the potential penalty, Adam nonetheless ate the forbidden fruit.<sup>20</sup> God, acting as judge and jury, refused to enforce the *in terrorem* clause to the promised extent.<sup>21</sup> Instead, God imposed a less severe penalty, that is, banishment from Eden.<sup>22</sup> On Eve, who instigated the breach, God assessed the additional punishment of painful childbirth.<sup>23</sup> Thus, the stage was set for the debate that still rages today, i.e., to what extent should the sanction provided in an *in terrorem* clause actually be imposed and what mitigating factors may the court properly consider?

#### 2. *Babylonian Civilization*

Over 4000 years ago, the people of Babylon included *in terrorem* provisions in marriage contracts to prevent alterations and to frighten the parties, as well as others, into adhering to the agreements. The following two examples were inscribed approximately 2200 B.C.

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19. *Genesis* 2:16-17.

20. *See id.* at 3:6.

21. *See id.* at 3:23-24.

22. *See id.* at 3:24.

23. *See id.* at 3:16.

Ahhu-ayabi is daughter of Innabatum. Innabatum, her mother, has given her in marriage to Zukania. Should Zukania forsake her, he shall pay one mana of silver. Should Ahhu-ayabi deny him, he may throw her down from the tower. As long as Innabatum lives, Ahhu-ayabi shall support her, and Innabatum afterwards [shall have nothing]<sup>24</sup> against Ahhu-ayabi, . . . [They have invoked the spirit of the Sun-god and Zabium (the king)]. Whoever changes the words of [th]is [tablet] [shall pay the penalty].<sup>25</sup>

Iltani is sister of Taram-Sagila. Arad-Samas, son of Ili-ennam, has taken them in marriage from Uttatum, their father . . . [If Iltani say to Arad-Samas, her husband], "Thou [art not my husband]," he may shave [her head], and sell her for silver. And [if] Arad-Samas say to his wives, "[Ye] are not my wives," he shall pay one mana of silver. And they, [if] they say to Arad-Samas, their husband, "Thou art not our husband," he may strangle them, and throw them into the river.<sup>26</sup>

Perhaps the earliest record of a testamentary *in terrorem* provision is found in the will of a Mesopotamian man written in the thirteenth century B.C.

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 (the possessions).<sup>27</sup>

As these examples illustrate, people have used *in terrorem* clauses since the earliest recorded history to control the conduct of others. Often the clauses would threaten physical violence, monetary penalties, or banishment from the household. As the next section explains, after the birth of Christ, the drafters of *in terrorem* clauses focused on society's biggest apprehension at the time, the fear of God and eternal damnation.

## B. ENGLAND PRIOR TO THE NORMAN CONQUEST

In England, Anglo-Saxon testators drafted *in terrorem* clauses focusing on the survivors' fear of facing God in the after life to prevent others from altering their wills. One historian wrote that the will of BIRTHRIC and his wife Elswith, written sometime around 950 A.D., was "the oldest tes-

24. The quoted clauses are reproduced without any modification to their form as published. Assyriology, the study of the literature and antiquities of the Babylonians and Assyrians, is a science still in development and, therefore, the author of the published text, from which we have taken these clauses, was required to rephrase certain obscure inscriptions. The changes are delineated by the words in brackets. Throughout this Article, only parentheticals that appeared in the original text will be found within quotation marks.

25. THEOPHILUS G. PINCHES, *THE OLD TESTAMENT IN LIGHT OF THE HISTORICAL RECORDS AND LEGENDS OF ASSYRIA AND BABYLONIA* 174 (2d ed. 1903).

26. *Id.* at 175.

27. II *THE ANCIENT NEAR EAST: A NEW ANTHOLOGY OF TEXT AND PICTURES* 80 (James B. Pritchard ed., 1975).



tament he had seen made in England."<sup>28</sup> The will contained the following *in terrorem* language.

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.<sup>29</sup>

The following *in terrorem* clauses were included in wills drafted over the next century. Because none of the documents contained dates, historians can only estimate the dates of origination through references and titles used within the instruments.

And I beseech whoever may then be king, for the love of God and all his saints, that let my children do what they may, they may never set aside the will which I have declared for my soul's sake. And if anyone alter it, may he have to account for it with God and the holy saints to whom I have bequeathed my property, so that he who shall alter this will may never repent it except in the torment of hell, unless I myself alter it before my death.<sup>30</sup>

Then I pray you, my dear friend Ælfheah, that [you] will watch both over the estate and those who are my kinsmen, and that you will never permit anyone to alter this in any way. If anyone do so, may God destroy him both soul and body, both here and in the future, unless I myself change it.<sup>31</sup>

If anyone ever alters or removes anything in this will may God's grace and his eternal reward be taken from him for ever; and may he never be found in his favour, but be excommunicated from the society of all Christ's chosen companies, both now and in eternity, unless he will quickly desist from that and also make full restitution.<sup>32</sup>

And whatsoever man shall alter this bequest, may he be a companion in the torment of hell of Judas who betrayed our Lord.<sup>33</sup>

He who alters this—may God expel him from the kingdom of heaven to the torments of hell, unless he repent it all the more deeply before his last day.<sup>34</sup>

And I pray my lady, for God's sake, that you will [not] permit anyone to alter my will. And he who alters it—unless it be myself—may God Almighty turn his face from him on the Day of Judgment.

28. JOHN SELDEN, *OF THE ORIGINAL OF ECCLESIASTICAL JURISDICTIONS OF TESTAMENTS* 5 (1683).

29. DOROTHY WHITELOCK, *ANGLO-SAXON WILLS* 29 (Harold Dexter Hazeltine ed., 1930).

30. *Id.* at 9, note at 104 (estimating date of origination to be between 946 and 951 and further noting that other scholars had dated will to have been drafted "about 958").

31. *Id.* at 16-17, note at 114 (determining that the document was drafted between 955 and 958) (alteration in the original).

32. *Id.* at 34-35, note at 133 (explaining the will was drafted sometime "[a]fter 975 and certainly before 1016").

33. *Id.* at 66-67, note at 175 (stating that the will was probably drafted between 1004 and 1014, but noting the will contained "an impossible list of witnesses").

34. *Id.* at 68-69, note at 179 (explaining why the will was probably written before 1038).

May God keep you.<sup>35</sup>

He who wishes to alter this will, unless it be I myself, may God destroy him now and on the Day of Judgment. Amen.<sup>36</sup>

And he who shall detract from my will which I have now declared in the witness of God, may he be deprived of joy on this earth, and may the Almighty Lord who created and made all creatures exclude him from the fellowship of all saints on the Day of Judgment, and may he be delivered into the abyss of hell to Satan the devil and all his accursed companions and there suffer with God's adversaries, without end, and never trouble my heirs.<sup>37</sup>

### C. EARLY COMMON LAW—NORMAN CONQUEST TO THE WILLS ACT OF 1540

After the Norman invasion and subsequent establishment of the feudal system, the power to dispose of land by will rapidly disappeared, except in several boroughs where the crown tolerated a contrary custom.<sup>38</sup> To avoid this restriction, buyers of land conveyed the acquired property to trustees, called feoffees, and prayed in their wills that the feoffees would follow the terms of the will by either entailing the land to the testator's sons or conveying the realty to whomever bought it from the executors.<sup>39</sup> The following provisions are illustrative of the type of language used in these wills.

I pray yow also pat ben my Feffees, pat ze make estate vn-to my forseyd chyldre, lucie, henre and william, lyke as my wylle ys be-fore conteynynd.<sup>40</sup>

And also I praye, and in goddisbyhalf require, pat alle pe feffes pat ben eneffyd in my londes, pat in what tyme pat pay ben duly required by myn Executours to make a-state to any person, pat pay performe hit in discharge of my soule, as pey woll onswere a-fore god. Also I pray my feffours pat pay wold suffer myn Executours to selle Stanlehalle, and to eneffe what man pay euer myn Executours require hem to.<sup>41</sup>

The changes to the law brought about by the Norman Conquest did not, however, effect the ability to dispose of personal property via testaments which were under the jurisdiction of the ecclesiastical courts.<sup>42</sup> Testators frequently left the bulk of their estate to priests, monks, and

35. *Id.* at 78-79, note at 187 (stating the will was drafted "[d]uring the episcopate of Elfweard of London, i.e., 1035 to 1044") (alteration in the original).

36. *Id.* at 83, note at 192 (reasoning that the will could not have been written later than 1045 with the earliest possible date being 1043).

37. *Id.* at 87, note at 197 (relying on the Latin heading in the register, which dated this will to 1046).

38. See 26 HALSBURY'S STATUTES OF ENGLAND 1322 (2d ed. 1951); WALTER T. DUNMORE, GARDNER ON WILLS 6 (2d ed. 1916); 1 WILLIAM H. PAGE, PAGE ON WILLS § 15 (3d ed. 1941).

39. See FREDERICK J. FURNIVALL, THE FIFTY EARLIEST ENGLISH WILLS IN THE COURT OF PROBATE, LONDON xiii (Frederick J. Furnivall ed., 1964) (1882).

40. *Id.* at 20 (taken from the will of Sir W.M. Langford dated 1411).

41. *Id.* at 72 (clause was contained in the 1426 will of W.M. Hanyngfeld).

42. See PAGE, *supra* note 38, at § 23.

fryers, even if it meant leaving their heirs penniless, and requested numerous masses to be held or prayers to be said for their souls, often for many years following their demise.<sup>43</sup>

Although this practice largely eliminated the need for *in terrorem* clauses because the heirs would have nothing to lose by disputing the instruments, a few examples have been preserved. The following *in terrorem* clauses are contained in wills which were exhibited to the former Officers of the Archbishop of Canterbury between 1395 and 1439, and are presently stored in the department for Literary Enquiry, in the Registry of the Court of Probate, Somerset House, London.

Also my wille ys, pat yf my wyfe or my chyldre askun here resnable part of my godes aftur cours of lawe, pan wille y pat pey be excludyd of alle pe avantage of pe ordinauns of my wylle above y-seyd. . . and y pray alle zow pat bene enfeffed in my londes forseyd by me, pay ze fulfyllle my forseyd wylle os ze wylle answere a-fore god.<sup>44</sup>

Also he will that if his wyf or eny of his saide sonnes worke the contrarye of this his present wille, in lettyng or distourbyng the saide executours of fulfilling ther-of, that than pey shall lose aduantage and benefite of thes his present will.<sup>45</sup>

And all-so that she clayme no dower nor Ioyntfeffement, nor no thyng do, ne wirke (that might greue his heires or his executours) In no maner degree contrarie his will, nor that she claime no Iointestate in none other of his londes ne rentez of his purchace, nor in no londes ne tenementez of his purchace, nor in no londes, tenementes nor annuities wich he hath graunted to eny of his seruantez for terme of lyf or othir wyse. And if she doo the contrarie to eny thyng of this his last will, or make eny clayme yn the contrarie ther-of, Than that she haue oonly but hir dower of all his maners landes and

43. See FURNIVALL, *supra* note 39, at xii

[T]he most surprizing and regrettable thing in these Wills is the amount of money to hav[e] been wasted in vain prayers, or orders for them. . . . [O]ne man ordered[ed] a [m]illion [m]asses to be said for his soul; another 10,000; another 4,400; another sending Pilgrims to Spain, Rome, Jerusalem, &c. for the good of his soul! I only hope some sensible Executors handed over the money to the Testators' wives and children, or the poor.

The Papists also holde it to be a work of [u]nspeakable merit, for a man or woman, eyther before they dye, or else at their death, to gi[v]e the greatest part of their goods & lands (the more, the more merite) to popish priestes, (though in the meane time, theyr wife, children, and wholde families goe a begging all theyr lyfe long,) to Monkes, and Fryers, with the rest of that filthie generation, to the ende they may pray for them when they are dead, to saie masses, trentalls, direges, *de prafundis*, Ladies psalters, and I can not tell what riffe raffie else for them: bearing them in hand, that their souls & the soules of al their friends, parents, dindred, and aliance, shall not onely be releued, but also cleerely delyuered thereby out of the pains of purgatorie, which otherwise shoulde lye there broiling in firie flames seauen yeeres for euerie sinne that euer they committed in this life, either in thoght, word, or deed. Which if it were true, (as it is most false and blasphemous) I could not blame men, though they ga[v]e all they had, and more too, to the Priests.

*Id.* (citing PHILLIP STUBBES, *MOTIVE TO GOOD WORKES* 120-22 (1593)).

44. *Id.* at 20-21 (found in will of Sir W.M. Langeford dated 1411).

45. *Id.* at 128 (quoting from the will of Sir Ralph Rochefort dated 1439).

tenementes of his enheritaunce forsaied.<sup>46</sup>

As the following examples illustrate, testators also utilized *in terrorem* clauses to persuade the beneficiaries to do or refrain from doing some act.

[I]f it so be that Thomas my sone forseyd, and Iohane his wif, wolle nought take the charge to be myne executors, and to parfourn the administracion of this testamentt, which is [my] laste wil, as it is wrete her'-before, thanne .I. wole that alle the godis which that .I. haue deuysed to the forseyd Thomas my sone and Iohane his wif in this testament, be solde by myn executours which wol take the charge herof, and trewly ydo to charitable werkes for my lordes soule, Sir Thomas West, and for myn, and for al cristene soules.<sup>47</sup>

Item I bequethe to the same Ionet my wyf my maner of Staverton with the appurtenaunces, in the shire of Gloucestre, to haue & to holde, terme of here lyfe, . . . Vp condicioun that the same Ionet suffre Emot, here moder, to reioise peisibly, & to haue & to holde, terme of the lyf of the same Emot, the Maner of Aspleye with the appurtenaunces; And al-so vp condicioun that same Ionet saue and kepe harmeles myn heirs & executours . . . And zif so be that [the] forsaide Jonet my wyf put oute the forsaide Emet here modir, in here lyf of the forsait Manere of Aspleye with the appurtenaunces, & pat may be recorded be Trewe men, than y wille that the same Ionet be vtterliche excluded & voyded fro the forsaide Manere of Staverton with the appurtenaunces, & pat she haue no profet per-of, terme of here lyf.<sup>48</sup>

Testators, remembering the common saying of the time that "Three Executors make three Thieves,"<sup>49</sup> typically included a warning in their wills, reminding their executors that God will question them about any forbidden actions they take with the testator's property.<sup>50</sup>

And I require hem all, and eueryche of hem, that they do trwly and feithfully theyre part and dever to execute and parforme this my last will, as they all and euerych of hem woll Answere a-fore god at the day of dome.<sup>51</sup>

#### D. MODERN COMMON LAW PERIOD—POST STATUTE OF WILLS

The English Parliament restored to landowners the ability to devise realty through a will with the enactment of the Statute of Wills in 1540.<sup>52</sup> Influenced by the "enlightened" thinking of the Renaissance, testators began to realize that their heirs were more concerned with the present than with any potential after life, be it a reward or a punishment. Thus,

46. *Id.* at 122 (included in Sir Ralph Rochefort's 1439 will).

47. *Id.* at 9 (quoting from the will codicil of Lady Alice West dated "a thousand and thre hundred and foure score and fiftene," or 1395).

48. *Id.* at 33-34 (taken from the 1418 will of John Chelmyswyk).

49. *See id.* at xiv.

50. *See id.* at 15, 17, 21, 27, 29, 42, 51, 54, 58, 66, 80, 87, 89, 97, 102, 112, 119.

51. *Id.* at 119 (warning taken from the will of the Countess of Warwick dated 1439).

52. *See* 32 Hen. VIII, ch. 1 (1540).

as society became more materialistic, *in terrorem* clauses shifted from appealing to the beneficiary's intangible fear of future unending suffering to immediate threats of losing a valuable devise or bequest.

The earliest reported case involving a forfeiture provision drafted after the Statute of Wills was decided in 1674.<sup>53</sup> In that Anonymous case, a testator devised certain lands to *A*,<sup>54</sup> his heir at law, and another piece of property to *B* in fee.<sup>55</sup> He included the following provision in his will, "If *A*. molest *B*. by suit or otherwise, he shall lose what is devised to him, and it shall go to *B*."<sup>56</sup> After the testator's death, *A* entered into and claimed the land of *B*. The Court of Common Pleas held that this entry and claim was a sufficient breach to entitle *B* to the land of *A*.<sup>57</sup>

In 1688, the High Court of Chancery examined the enforceability of *in terrorem* provisions.<sup>58</sup> In *Powell v. Morgan*, the testatrix left a will devising her land and giving her heir at law, who brought the suit, a legacy upon condition that he refrain from disturbing or interrupting her will. The heir brought suit challenging the validity of the will. The High Court of Chancery, without any explanation, held, "[t]here was *probabilis causa litigandi*," and consequently no forfeiture of the legacy.<sup>59</sup> Thus, fourteen years after the Court of Common Pleas upheld the enforceability of *in terrorem* provisions, the High Court of Chancery developed the first rudimentary good faith, probable cause exception to its application.<sup>60</sup>

Shortly thereafter, the High Court of Chancery considered the application of *in terrorem* clauses to trusts.<sup>61</sup> In *Webb v. Webb*, decided in 1710, an English court ruled that a provision in a will giving a beneficiary forty pounds on condition that he did not disturb the trustees was valid and enforceable. The High Court of Chancery held, again without any discussion of its reasoning, that if the trustee were about to have an execution of the trust, the son would forfeit his legacy if he failed to join in the sale.<sup>62</sup>

53. See Anonymous, 2 Mod. 7, 7, 86 Eng. Rep. 910, 910 (1674) (holding forfeiture provision valid under express terms provided by will); see also Leavitt, *supra* note 2, at 47 (discussing historical setting of *in terrorem* provision and identifying important early cases).

54. Many of the earlier reported English cases were styled "Anonymous." In these cases, the reporter would refer to the parties as *A*, *B*, *C*, etc. to retain the parties' anonymity.

55. Anonymous, 86 Eng. Rep. at 910.

56. *Id.*

57. See *id.*

58. See *Powell v. Morgan*, 2 Vern. 90, 23 Eng. Rep. 668 (Ch. 1688) (hailed by some authors as the first reported case of the no-contest provision, but its precedential use was limited because of the lack of discussion about the *in terrorem* provision); Olin L. Brownder, Jr., *Testamentary Conditions Against Contest Re-Examined*, 49 COLUM. L. REV. 320, 320 n.1 (1949); Leavitt, *supra* note 2, at 48 n.12 (noting *Powell* decision was first case in which court set out entire decision with regard to contested *in terrorem* provision).

59. *Powell*, 23 Eng. Reg. at 668.

60. See Leavitt, *supra* note 2, at 59; Dawn Koren, *No-Contest Clauses: Settlement Offers from the Grave*, 12 PROB. L.J. 173, 176 (1995).

61. See *Webb v. Webb*, 1 P.W.M.S. 132, 24 Eng. Rep. 325 (1710). See also Leavitt, *supra* note 2, at 48.

62. See *Webb*, 24 Eng. Rep. at 327; Leavitt, *supra* note 2, at 48.

In the 1734 case of *Loyd v. Spillet*, however, the Lord Chancellor refused to enforce an *in terrorem* clause because to do so would have protected a trustee who had breached his fiduciary duties.<sup>63</sup> The testator had made a will devising all his real and personal property to the defendant and another trustee (since dead), in trust to pay £15 per year to the plaintiffs, his sisters. After several legacies, the testator devised the surplus in trust with instructions to make specific annual payments to certain ministers.<sup>64</sup> The testator also gave £300 to both trustees and £20 per year to compensate them for administering the trust.<sup>65</sup> The will contained an *in terrorem* clause that revoked the sisters' annuities if they disputed the will.<sup>66</sup> Afterwards, the testator transferred his real and personal estates, by separate deeds dated after his will, to the trustees with a proviso stating the deeds would be void on the tender of tens. The trustees, after making regular annual payments to the beneficiaries for some time, suddenly refused to pay the sisters or the ministers and continued to collect the rents and income from the trust property for their own use.<sup>67</sup> The sisters brought this suit against the one surviving trustee claiming the two deeds being subsequent to the will acted as a revocation of the will. Further, they argued that because the transfers were voluntary, without consideration, and made to the defendant as trustee, a resulting trust should arise for the sisters who were the heirs at law.<sup>68</sup> The trustee in his answer claimed the will was valid and asked the court to determine if the sisters had forfeited their annuities by prosecuting the suit.<sup>69</sup> The Lord Chancellor declared that "he very much disliked the defense that had been made in controverting the payment of these small annuities . . . , and insisting that they had been forfeited by this their bill."<sup>70</sup> The Lord Chancellor ordered the trustee to resume paying the trust beneficiaries their annual payments along with all payments in arrears. He also ordered the trustee to pay the sisters' costs incurred in bringing the suit and denied the trustee's prayer to take the costs from the estate, stating "the trustee had made so ill a defense, as not to have deserved the least favour by this decree."<sup>71</sup>

*Cooke v. Turner*,<sup>72</sup> decided in 1846 by the English High Court of Chancery, is the most notable early decision declaring a forfeiture based upon a beneficiary's post-testamentary conduct.<sup>73</sup> In *Cooke*, Sir Gregory Page

63. See *Loyd v. Spillet*, 3 P.W. 344, 346, 24 Eng. Rep. 1094 (1734); Leavitt, *supra* note 2, at 48.

64. See *Loyd*, 24 Eng. Rep. at 1094.

65. See *id.*

66. See *id.*

67. See *id.*

68. See *id.*

69. See *id.* at 1095.

70. *Id.*

71. *Id.*

72. 15 M. & W. 727, 153 Eng. Rep. 1044 (Ex. 1846).

73. See *id.* at 1046-47. See, e.g., *Meech*, 169 U.S. at 413 (citing to *Cooke* case as authority on general validity of *in terrorem* provisions); *Rudd v. Searls*, 160 N.E. 882, 886 (Mass. 1928) (summarizing English law founded upon *Cooke*, which held that although contest

Turner, the testator, was declared a lunatic by a commission of lunacy in 1823 and subsequently by a jury in 1826.<sup>74</sup> In 1841, he made a will, which was never revoked or modified before his death in 1843.<sup>75</sup> In his will, Sir Gregory devised a considerable legacy to his daughter, who was his only child and heiress at law, on condition that if she, or any of her representatives, shall ever

dispute this my will, or my competency to make the same, or if [she] . . . shall refuse to confirm this my will, . . . shall lodge any caveat against proving the same, . . . shall refuse or neglect to withdraw or cause to be withdrawn such caveat, fourteen days after request made by my executors . . . or if any proceedings . . . be . . . taken by any person . . ., by any possible result of which any estate or interest could be in any way attainable by my said daughter, . . . of larger extent or value than is intended for her by this my will, and any such proceeding shall not be formally disavowed, stayed or resisted by my said daughter . . ., then I revoke the use and disposition hereinbefore contained, for the raising and payment, during the life of my said daughter, . . . of the aforesaid yearly sum of £2000, . . . of the rents and issues and profits of my estate hereby devised, and also the liberty of residing in my said mansion-house, and all other benefits hereinbefore given to or in trust for my said daughter, or derivable by her under this my will, and in lieu thereof I devise . . ., the yearly sum of £300 only . . . .<sup>76</sup>

After Sir Gregory died, his daughter disputed the will, his competency to dispose of his property, and refused to take any action to confirm the will.<sup>77</sup> The Barons of Exchequer found the daughter brought herself both within the "letter and spirit" of the proviso, "by which her interest is made to determine" and, therefore, her gift was "clearly forfeited, unless the proviso itself is void."<sup>78</sup> The daughter argued that enforcement of the proviso was "against the liberty of the law" and was therefore void.<sup>79</sup> She based her argument on the fact that the Statute of Wills declared "wills made by persons of non-sane memory" to "not be good or effectual in the law" and, thus, it was "contrary to the policy of that law" to prevent an heir at law from "having the fact of the testator's sanity ascertained."<sup>80</sup> The court responded:

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made upon probable cause, bequest was forfeited); *Schiffer*, 226 N.W. at 254 (addressing historical significance of *Cooke* and following its precedent); see also Edwin C. Goddard, *Forfeiture Conditions in Wills as Penalty for Contesting Probate*, 81 U. PA. L. REV. 267, 273 (1933) (acknowledging *Cooke v. Turner* as leading English case and detailing history of forfeiture provision); Robert E. Kuelthau, Note, *Wills: Validity of No-Contest Clauses in Wills*, 43 MARQ. L. REV. 528, 529 (1960) (examining policy arguments for forfeiture of bequests in adherence to *in terrorem* provisions under *Cooke*).

74. See *Cooke*, 153 Eng. Rep. at 1044.

75. See *id.*

76. *Id.*

77. See *id.*

78. *Id.* at 1046.

79. *Id.*

80. *Id.* at 1045.

There is no duty on the part of an heir, whether of perfect or imperfect obligation, to contest his ancestor's sanity. It matters not to the state whether the land is enjoyed by the heir or the devisee; and we conceive, therefore, that the law leaves the parties to make just what contracts and what arrangements they may think expedient, as to the raising or not raising questions of law or fact among one another, the sole result of which is to give the enjoyment of property to one claimant rather than another.<sup>81</sup>

This was not the final ruling, however, on Sir Gregory's *in terrorem* provision. One year later, in *Cooke v. Turner II*,<sup>82</sup> the Vice-Chancellor, who had to decide whether to probate the will, decided to allow the appointed trustee of the unborn issue to bring a suit to determine the validity of the will or, more specifically, the sanity of the testator. The Vice-Chancellor was concerned with the fact that Sir Gregory had remained the subject of a lunacy commission up to his dying day, while the Solicitor, who was charged with caring for him, assisted and witnessed the drafting of his will. Further, the Solicitor, who testified to Sir Gregory's sanity at the first trial, never informed the commission of his alleged recovery. The Vice-Chancellor, who may have been concerned with the specific restriction on challenging Sir Gregory's competency, wrote "my opinion is that that very clause, emanating as it did from the testator himself, tends to sh[o]w that he was conscious that he was not in that state of mind in which the law requires a man to be when he executes a will."<sup>83</sup> The Vice-Chancellor chose to relieve the daughter, who refused to take part in the proceeding due to the earlier construction of the *in terrorem* clause, from application of the forfeiture. The court, once again, seemed to be attempting to engraft a good faith, probable cause exception onto the *in terrorem* doctrine.<sup>84</sup>

In determining the application of *in terrorem* provisions, the English courts followed common law rules with respect to devises of realty, and the rules established by the ecclesiastical courts with regards to bequests of personalty.<sup>85</sup> The ecclesiastical courts, which followed civil law, declared bequests of personalty to be "*in terrorem* only" unless they provided for a gift over.<sup>86</sup> The English rule that emerged was that *in terrorem* clauses were valid and enforceable when they concerned a devise of land, even in the absence of a gift over.<sup>87</sup> The courts, however, treated forfeiture provisions as "merely *in terrorem*," that is, an empty threat, when they concerned personalty and failed to provide for a gift over if the clause was breached.<sup>88</sup> However, the courts enforced *in terrorem* clauses relating to personalty when the provision included a gift

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81. *Id.* at 1047.

82. 15 Sim. 611, 60 Eng. Rep. 757 (1847) (*aff'd* by the Lord Chancellor in 16 Sim. 482).

83. *Id.* at 762.

84. See Leavitt, *supra* note 2, at 59; Koren, *supra* note 60, at 176.

85. See Bradford v. Bradford, 19 Ohio St. 546, 547 (1869) (citations omitted).

86. See *id.*

87. See BOWE & PARKER, *supra* note 5, § 44.29, at 470 (citations omitted).

88. See *id.*



over.<sup>89</sup> The Master of the Rolls wrote, "when the legacy is once vested in the devisee over, equity cannot fetch it back again."<sup>90</sup>

#### E. UNITED STATES DEVELOPMENT

In 1869, an American court for the first time directly ruled on the validity of an *in terrorem* clause.<sup>91</sup> The will in question had bequeathed \$600 to William Bradford and contained the following provision: "Now, if any of my heirs is dissatisfied and goes to law to break this will, then my will is and I direct that they shall have no part of my estate, and I debar them from any part of my estate whatever."<sup>92</sup> The executor filed suit for construction of the will to determine the validity and effect of this *in terrorem* clause because Bradford had instituted an unsuccessful action to contest and set aside the will. The lower court held that the clause was valid and that, consequently, Bradford had forfeited his legacy.<sup>93</sup> The court then rejected the common law rule in England of upholding no-contest clauses relating to realty, but treating no-contest clauses with respect to personalty as merely *in terrorem* unless the clause provided for a gift over of the forfeited legacy. The court explained its decision as follows.

In regard to both [devises of realty and bequests of personalty], it is the duty of the courts to carry out the intention of the testator, unless that intention be contrary to the policy of the law. No considerations of public policy require that an heir should contest the doubtful questions of fact or of law upon which the validity of a devise or a bequest may depend. The determination of such questions ordinarily affects only the interests of the parties to the controversy . . . . Hence we assume that in this country, any such condition, which is reasonable,—as one against disputing one's will surely is, as nothing can be more in conformity to good policy than to prevent litigation,—will be held binding and valid.<sup>94</sup>

Subsequently, in 1898, the United States Supreme Court examined the validity of an *in terrorem* provision in *Smithsonian Institution v. Meech*.<sup>95</sup> The testator had devised the majority of his estate, including a house he had purchased in the name of his late wife, to the Smithsonian Institute. After making sundry bequests to his own relatives, the testator left \$1,000 to be divided among his late wife's sister and brothers subject to an *in terrorem* provision stating that "[t]hese bequests are all made upon the

89. See *Morris v. Burroughs*, 1 Atk. 398, 404 (1737) (citing *Cleaver v. Spurling*, 2 P.W. 526, 528, 24 Eng. Rep. 846, 847 (1729)).

90. *Cleaver v. Spurling*, 2 P.W. 526, 528, 24 Eng. Rep. 846, 847 (1729).

91. See *Bradford*, 19 Ohio St. at 546; see also Koren, *supra* note 60, at 176.

92. *Bradford*, 19 Ohio St. at 546.

93. See *id.* at 547 (the forfeited legacy passed to the testator's general residuary beneficiaries in the absence of a gift over).

94. *Id.* at 547-48.

95. 169 U.S. 398, 413-15 (1898). See also Brownder, *supra* note 58, at 332 (noting that the *Meech* decision is the most frequently cited case in support of the general validity of *in terrorem* clauses).

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 named.”<sup>96</sup>

After the testator’s death, his late wife’s sister and brothers claimed title to the property, which was held in the name of his late wife, through intestate succession. The court first found an implied resulting trust for the benefit of the testator over this property and then determined that the contest caused the forfeiture of the legacy left to his late wife’s siblings. The court justified its decision by relying on the proposition that

[f]rom the earliest case on the subject, the rule is that a man shall not take a benefit under a will and, at the same time, defeat the provision of the instrument. If he claims an interest under an instrument, he must give full effect to it, so far as he is able to do so. He cannot take what is devised to him, and at the same time, what is devised to another; although, but for the will, it would be his; hence he is driven to his election to say, which he will take.<sup>97</sup>

Having reviewed the authorities upholding *in terrorem* provisions, the Court adopted the view that forfeiture provisions were to be upheld because they were consistent with “good law and good morals.”<sup>98</sup>

After resolving the threshold issue of the validity of *in terrorem* provisions, the court must determine whether the beneficiary’s conduct is a “contest,” which triggers forfeiture.<sup>99</sup> Courts typically conclude that actions asserting undue influence, coercion, fraud, revocation by subsequent instrument, and lack of testamentary capacity are intended to invalidate the proffered will, thereby frustrating the testator’s intent and

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96. *Meech*, 169 U.S. at 398.

97. *Id.* at 414-15.

98. *Id.* at 415 (reviewing extensive English history and limited American history of the effect of *in terrorem* provisions).

99. See *Snook v. Sessoms*, 350 S.E.2d 237, 241 (Ga. 1986) (noting that whether no-contest clause was violated depends upon the definition of “contest,” which is determined on case-by-case basis); see also *Varney v. Superior Court (Antolin)*, 12 Cal. Rptr. 2d 865, 873 (Cal. Ct. App. 1993) (defining contest narrowly so action would not be ruled as proceeding that would trigger *in terrorem* provision). In *Varney*, the court, in considering that the will was drafted by an attorney, decided to use the technical definition provided by the California Probate Code. See *id.* at 871. The California Probate Code defines a contest as “an attack in a proceeding on an instrument or on a provision in an instrument.” CAL. PROB. CODE § 21300(a) (Deering 1991). The court ruled that the cause of action, which sought recovery of property under an oral contract, was not a contest. See *Varney*, 12 Cal. Rptr. 2d at 874; see also *Poag v. Winston*, 241 Cal. Rptr. 330, 337 (Cal. Ct. App. 1987) (interpreting provisional language and defining “contest” as “encouragement or assertion of any claim or proceeding which seeks to nullify or prevent the successful implementation of any part or all of the declaration of trust”).

triggering a forfeiture.<sup>100</sup> In contrast, the most frequently cited examples of actions that do not result in forfeiture are suits calling for the construction or interpretation of wills to ascertain the testators' true legal meaning rather than to render the instruments void or nullify any of their provisions.<sup>101</sup>

### III. MODERN APPROACHES FOLLOWED IN THE UNITED STATES

In the United States today, courts typically adopt one of four major approaches when evaluating *in terrorem* clauses.<sup>102</sup> Courts treat such clauses as (1) void, (2) valid but usually ineffective as overbroad, (3) generally valid, or (4) valid unless the contestant brought the will contest in good faith and with probable cause.<sup>103</sup> This section details each of these four methods of evaluating *in terrorem* provisions.

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100. See *Barry v. American Sec. & Trust Co.*, 135 F.2d 470, 471 (D.C. Cir. 1943) (negating devise under will because beneficiary filed suit alleging lack of mental capacity, fraud, coercion, and undue influence); *In re Lefranc's Estate*, 239 P.2d 617, 620-22 (Cal. 1952) (establishing suit to revoke probate of will on assertion testator was of unsound mind is contest intended to thwart testator's intended disposition); *In re Estate of Markham*, 115 P.2d 866, 870 (Cal. Ct. App. 1941) (announcing that the court could not conceive of more outright and direct attack upon validity of will than by filing contest that is based upon fraud and lack of mental capacity); *South Norwalk Trust Co.*, 101 A. at 962 (authorizing forfeiture because testator's children as beneficiaries initiated suit on ground that testator was of unsound mind); *Hurley v. Blankenship*, 267 S.W.2d 99, 100 (Ky. 1954) (applying forfeiture clause because contest brought upon several allegations including lack of testamentary capacity and undue influence); *Dainton v. Watson*, 658 P.2d 79, 80 (Wyo. 1983) (holding that forfeiture was mandatory because beneficiary initiating suit alleging will invalid on grounds of improper execution, incompetency of testator, and undue influence); see also UNIF. PROB. CODE § 3-407 (1982) (establishing that contestant of will has burden of establishing undue influence, duress, mistake, revocation, lack of testamentary capacity, lack of testamentary intent, or fraud). See generally 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, 661-67 (1992) (surveying broad authority that finds contests brought under allegations of undue influence, duress, lack of testamentary capacity, fraud, and coercion decided as matter of law); *Validity and Enforceability*, *supra* note 3, at 373 (identifying most frequent grounds for contesting will being lack of testamentary capacity, undue influence, fraud, forgery, improper execution, or revocation by subsequent will).

101. See, e.g., *Griffin v. Sturges*, 40 A.2d 758, 760 (Conn. 1944) (determining that when action is brought to secure interpretation of will, it is not "contest" within forfeiture provision); *South Norwalk Trust Co.*, 101 A. at 963 (acknowledging that action initiated to determine construction of will or any of its parts is not held to breach forfeiture provision because action is not brought to invalidate will, but to ascertain its true legal meaning); *Calvery v. Calvery*, 55 S.W.2d 527, 530 (Tex. 1932) (holding that purpose of suit was to construe provision of will not contest validity); see also CAL. PROB. CODE § 21320(a) (Deering 1991) (authorizing declaratory relief without forfeiture). The California statute provides that, "[i]f an instrument containing a no contest clause is or has become irrevocable, a beneficiary . . . may apply to the court for a determination of whether a particular motion, petition, or other act by the beneficiary would be a contest within the terms of the no contest clause." *Id.* See generally Jack, *supra* note 7, at 731 (discussing determination of what constitutes a will contest).

102. See Leavitt, *supra* note 2, at 54; Koren, *supra* note 60, at 177.

103. See Leavitt, *supra* note 2, at 54; Koren, *supra* note 60, at 177.

A. *IN TERROREM* PROVISIONS TREATED AS VOID

The blanket unenforceability of *in terrorem* provisions typically has a statutory basis. Two states, Indiana<sup>104</sup> and Florida,<sup>105</sup> have statutes rendering *in terrorem* clauses invalid and unenforceable under all circumstances.<sup>106</sup> These states refuse to allow a testator to interfere with their citizens' ability to utilize the justice system to ascertain their rights and duties.<sup>107</sup> Some commentators assert that this approach encourages dissatisfied beneficiaries to threaten litigation to gain bargaining power.<sup>108</sup>

The 1853 South Carolina case of *Mallet v. Smith*<sup>109</sup> provides insight into the judicial reasoning that *in terrorem* clauses are void. Although the majority held that an *in terrorem* provision containing a gift over in the event of a contest was valid, one justice wrote further on the subject.<sup>110</sup>

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.<sup>111</sup>

Although this rationale has not gained widespread acceptance as a basis for deeming *in terrorem* provisions void, it has been cited as forming the basis for the widely adopted probable cause exception to their enforceability.<sup>112</sup>

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104. IND. CODE ANN. § 29-1-6-2 (Michie 1976).

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.

*Id.*

105. FLA. STAT. ANN. § 732.517 (West 1995) ("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.").

106. See Leavitt, *supra* note 2, at 47 (discussing Indiana statute that declares forfeiture provision in will void); John A. Warnick, *The Ungrateful Living: An Estate Planner's Nightmare—The Trial Attorney's Dream*, 24 LAND & WATER L. REV. 403, 420 (1989) (commenting upon statutory exceptions to *in terrorem* provision in various jurisdictions).

107. See Koren, *supra* note 60, at 181.

108. See Henry A. Fenn & Edward F. Koren, *The 1974 Florida Probate Code: A Marriage of Convenience*, 27 FLA. L. REV. 1, 43 (1974); see also Koren, *supra* note 60, at 181.

109. S.C. Eq. (6 Rich. Eq.) 12 (1853).

110. See *id.* at 18.

111. *Id.* at 19-20. See Leavitt, *supra* note 2, at 54-55.

112. See Leavitt, *supra* note 2, at 55.

B. *IN TERROREM* CLAUSES TREATED AS VALID BUT INEFFECTIVE  
BECAUSE OF OVERBREADTH

Courts may refuse to enforce *in terrorem* clauses when the donor attempts to control beneficiaries in an overwhelming manner.<sup>113</sup> This result may be due to poorly drafted clauses or overzealous testators. For example, in *In re Estate of Sands*,<sup>114</sup> the testatrix, who had been the life beneficiary and trustee of another estate, threatened to revoke all legacies and bequests to any beneficiary of the trust who "file[d] any exception to [her] account or took any action contrary to her interest."<sup>115</sup> The court wrote that

[s]uch a testamentary forfeiture, if enforced, could put the beneficiary named in her will in the dilemma of taking under the will what in fact was already his, it having been stolen from him, or taking the hazard of litigation, with all its expenses, to obtain his due, by seeking to surcharge the deceased fiduciary's estate.<sup>116</sup>

The court struck down the forfeiture clause with the admonition 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."<sup>117</sup>

A New York court examined a similar clause in *In re Andrus' Will*.<sup>118</sup> The testator left his residuary estate to two inter vivos trusts and included a forfeiture clause that required all beneficiaries to "by a writing in form satisfactory to my Executors and/or Trustees, . . . respectively acquiesce in the administration, . . . and approve, ratify and confirm all acts and things done by the respective trustees . . . with respect to . . . both or either of said trust agreement and the income therefrom."<sup>119</sup> The court refused to enforce the clause, finding it "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."<sup>120</sup>

A Louisiana Court of Appeals declared an *in terrorem* clause "*contra bonos mores*, null in its entirety and therefore regarded as if it were not in the will."<sup>121</sup> The clause at issue was contained in the testator's holographic will and provided for forfeiture of the legacies to the testator's two nieces if "any heir" challenged the will.<sup>122</sup> A nephew who was not named as a beneficiary contested the will.<sup>123</sup> The court wrote, "[u]nder

113. See *id.*; Koren, *supra* note 60, at 181.

114. 62 Pa. 153 (1949).

115. *Id.*

116. *Id.* at 154.

117. *Id.* at 155.

118. 281 N.Y.S. 831 (1935).

119. *Id.* at 840.

120. *Id.* at 852.

121. Succession of Kern, 252 So. 2d 507, 509 (La. Ct. App. 1971).

122. *Id.* at 510.

123. See *id.* at 509.

the circumstances, the legatees are virtually helpless and at the mercy of any heir not mentioned in the will. Such an heir need only threaten to file suit in order to force a legatee to surrender a portion of his legacy to prevent the have-not heir from instituting legal proceedings."<sup>124</sup> Accordingly, this court concluded that "[s]uch a provision is repugnant to law and good morals and cannot be sanctioned by the courts."<sup>125</sup>

### C. *IN TERROREM* CLAUSES TREATED AS VALID WITHOUT EXCEPTION

Several courts have decided that *in terrorem* provisions contained in valid wills are entitled to enforcement without exception. For example, the Alabama Supreme Court stated that "[t]he testator possessed the right of disposing of his property as he saw fit, so long as he violated no law or established principles 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."<sup>126</sup>

In *Rudd v. Searles*,<sup>127</sup> the Supreme Judicial Court of Massachusetts rejected the contestant's assertion that it should adopt the good faith, probable cause exception to the enforceability of *in terrorem* provisions. The court reasoned that this exception would violate the "deliberately expressed purpose of the testator" and "would also deprive the donee of the gift over in case of contest by the first named beneficiary" under the will.<sup>128</sup> Furthermore, due to the invariable exposure of the private and personal affairs of the testator during a will contest, along with the resulting animosities and aroused hostilities among the testator's family members, "a[n] [*in terrorem*] clause of this nature may contribute to the fair reputation of the dead and to the peace and harmony of the living."<sup>129</sup>

In *Rossi v. Davis*,<sup>130</sup> the Supreme Court of Missouri discussed the important policies that support the strict enforcement of *in terrorem* clauses.

It must be conceded that . . . a person may dispose of his property as he wishes. A prospective heir has, generally speaking, no vested right in his ancestor's property. If there be a will, the legatee or devisee takes thereunder what the will gives him and subject to the conditions thereby imposed. He may contest the will and show, if he can, that it is *not the will* of his ancestor, whereupon the whole purported will falls. But if it be established that it is in fact the ancestor's will, then it would seem the will must stand, not in part but *in toto*. One cannot claim under a will and against it at the same time. He takes according to the will, or, so far as concerns the will, not at all. "It is a general principle of law that one cannot claim under a will and against it too, and one who accepts a beneficial interest under a will thereby adopts the whole will and renounces every right

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124. *Id.* at 510.

125. *Id.*

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

127. 160 N.E. 882, 886 (Mass. 1928).

128. *Id.*

129. *Id.*

130. 133 S.W.2d 363 (Mo. 1939).

or claim that is inconsistent with the will."<sup>131</sup>

In 1943, the Court of Chancery of New Jersey wrote, "we do not recognize, as do some jurisdictions, exceptions or limitations of the rule [that *in terrorem* clauses are valid], . . . whether there is a gift over and whether the contest is in good or bad faith or on probable cause."<sup>132</sup> The court continued its strong affirmation of *in terrorem* clauses when it stated that "in New Jersey the right of a testator to dispose of his property and to impose valid conditions against contest is established, thus upholding the right of a testator to say to his legatee, devisee or beneficiary—take what I offer or take nothing at all."<sup>133</sup>

Rhode Island took a similar approach in *Elder v. Elder*.<sup>134</sup> A devisee contested a will in the face of an *in terrorem* clause on grounds of undue influence, lack of testamentary capacity, and failure to satisfy the requisite formalities.<sup>135</sup> The justices' research revealed that courts upholding the validity of *in terrorem* clauses had found nothing in reason or legal principle to support a gift over requirement or a good faith, probable cause exception.<sup>136</sup> Instead, courts applied "the well-established rule of construction of wills by which effect is given to the clearly-expressed intent of the testator so long as the condition attached to the gift violates no positive rule of law or public policy."<sup>137</sup> The court adhered "to the cardinal rule of construction . . . whereby the whole will of the testator must be given effect according to its clearly expressed intent if it is not contrary to law or public policy."<sup>138</sup> A testator is not obligated to leave a gift to his child, nor is a child obligated to accept one, with or without a condition.<sup>139</sup> Further, a child has no duty, either individually or as a result of public policy, to contest the validity of his parent's will.<sup>140</sup> "Certainly, effect can be given to these legal principles without depriving a beneficiary of his freedom to contest the will."<sup>141</sup> Since the son, in this case, challenged the will, it cannot be said that the clause deprived him of his legal right to do so. Accordingly, the court concluded that an *in terrorem*

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131. *Id.* at 372 (citations omitted). In *Rossi*, the court explained how an *in terrorem* clause does not interfere with a contestant's access to the courts as follows:

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.

*Id.*

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

133. *Id.* at 105.

134. 120 A.2d 815 (R.I. 1956).

135. *See id.* at 817.

136. *See id.* at 818.

137. *Id.*

138. *Id.* at 819.

139. *See id.*

140. *See id.*

141. *Id.*

clause would not restrain an individual's liberty of action under the law, because "it is only after a beneficiary has contested a will unsuccessfully that the instant question of forfeiture becomes material."<sup>142</sup>

In 1983, the Wyoming Supreme Court was faced with the issue for the first time in *Dainton v. Watson*.<sup>143</sup> The court chose not to observe the probable cause, good faith exception.<sup>144</sup> After considering the long-standing Wyoming policy of following the testator's clear and unambiguous language, the justices reasoned that because the *in terrorem* clause "quite unambiguously" did not exempt beneficiaries who brought a contest in good faith or with probable cause, it would be an improper judicial construction for the court to apply the terms of the clause differently than expressed by the testator.<sup>145</sup> The court found additional support for this position in the state legislature's refusal to incorporate the Uniform Probate Code's good faith, probable cause exception in Wyoming's newly revised probate code.<sup>146</sup> The court refused to take a judicial activist role when it wrote that "[i]f public policy favors the adoption of provisions similar to those found in § 3-905 of the U.P.C., then it is for the legislature to make those provisions part of the probate law of Wyoming and not the courts."<sup>147</sup>

D. *IN TERROREM* CLAUSES TREATED AS VALID UNLESS CONTEST  
BROUGHT WITH GOOD FAITH AND PROBABLE CAUSE  
(UNIFORM PROBATE CODE APPROACH)

The majority of American jurisdictions refuse to enforce *in terrorem* clauses if the contestants act with good faith and probable cause.<sup>148</sup> The origins of this exception are found in the 1688 English case of *Powell v. Morgan*,<sup>149</sup> where, without explanation, the court simply stated that the contestant had "*probabilis causa litigandi*," and that consequently no forfeiture would result.<sup>150</sup> The first American case to cite the probable cause exception was the 1863 Pennsylvania case of *Chew's Appeal*.<sup>151</sup> However, the court did not rule on the applicability of the exception because the justices concluded that the beneficiary's action did not fall within the scope of the conduct the *in terrorem* provision prohibited.<sup>152</sup> Today, at least eleven states that recognize the general validity of *in terrorem* provisions have created a judicial good faith, probable cause

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142. *Id.*

143. 658 P.2d 79, 81 (Wyo. 1983). *See also* Warnick, *supra* note 106, at 420 (discussing Wyoming's adoption of the strict construction of no-contest clauses).

144. *See Dainton*, 658 P.2d at 82.

145. *Id.* at 81.

146. *See id.* at 82.

147. *Id.*

148. *See, e.g.*, Koren, *supra* note 60, at 177.

149. 2 Vern. 90, 23 Eng. Rep. 668 (Ch. 1688).

150. *Id.* at 668-69.

151. 45 Pa. 228 (1863) (surveying early authorities that allowed exception to forfeiture if probable cause existed).

152. *See id.* at 232 (stating in dicta that exception applies when probable cause is shown).



exception.<sup>153</sup>

In one of the first cases to apply a judicial good faith, probable cause exception, the justices of the Supreme Court of Errors of Connecticut carefully explained the public policies supporting their determination.

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 other. Courts cannot know whether a will, good on its face, was made in conformity to statutory requirements . . . unless these matters are presented to the courts. 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 . . . , 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. Courts exist to ascertain the truth . . . , and a right of devolution which enables a testator to shut the door of truth and prevent the observance of the law is a mistaken public policy.<sup>154</sup>

Because of the problematic nature of waiting for the courts to decide that a good faith, probable cause exception is appropriate, the legislatures of many states have enacted statutes imposing this limitation.<sup>155</sup> The statutory exception is usually applicable without regard to the reason for the contest.<sup>156</sup> A few states, however, limit the application of the exception

153. See *South Norwalk Trust Co.*, 101 A. at 963; *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); *Hartz*, 77 N.W.2d at 171; *Seymour*, 600 P.2d at 278; *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 (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). See generally *Geisinger v. Geisinger*, 41 N.W.2d 86, 89 (Iowa 1950) (discussing history, definition, and policy reasons behind probable cause exception); *Validity and Enforceability*, *supra* note 3, at 379 (summarizing various court determinations of what constitutes probable cause).

154. *South Norwalk Trust Co.*, 101 A. at 963.

155. See UNIF. PROBATE CODE § 3-905, 8 U.L.A. 383 (1982) (mandating exception due to desire to ensure will's validity). The Uniform Probate Code provides that "[a] provision in a will purporting to penalize any interested person from contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings." *Id.* The Uniform Probate Code has been used as a model for the probable cause exception in 14 states. See ALASKA STAT. § 13.16.555 (Michie 1996); ARIZ. REV. STAT. ANN. § 14-3905 (West 1975); COLO. REV. STAT. ANN. § 15-12-905 (West 1974); HAW. REV. STAT. ANN. § 560:3-905 (Michie 1997); IDAHO CODE § 15-3-905 (1979); ME. REV. STAT. ANN. tit. 18-A, § 3-905 (West 1979); MD. CODE ANN., EST. & TRUSTS § 4-413 (1991); MICH. COMP. LAWS § 700.168 (1980); MINN. STAT. ANN. § 524.2-517 (West Supp. 1997); MONT. CODE ANN. § 72-2-537 (1997); NEB. REV. STAT. § 30-24,103 (1995); N.J. STAT. ANN. § 3B:3-47 (West 1981); N.D. CENT. CODE § 30.1-20-05 (1996); UTAH CODE ANN. § 75-3-905 (1993). See generally *Leavitt*, *supra* note 2, at 47 (surveying variation of legal treatment of forfeiture clause from jurisdiction to jurisdiction); *Warnick*, *supra* note 106, at 420 (discussing statutory and judicial exceptions to strict forfeiture under *in terrorem* provisions).

156. See, e.g., HAW. REV. STAT. ANN. § 560:3-905; MINN. STAT. ANN. § 524.2-517; N.J. STAT. ANN. § 3B:3-47. These statutes state: "A provision in a will purporting to penalize

to certain types of contests.<sup>157</sup>

Both the National Conference of Commissioners on Uniform States Laws and the American Law Institute advocate the good faith, probable cause exception. The Uniform Probate Code states that an *in terrorem* provision may not be enforced if probable cause exists for initiating the will contest.<sup>158</sup> The *Restatement (Second) of Property* similarly limits the enforceability of an *in terrorem* provision if "there was probable cause for making the contest or attack."<sup>159</sup>

#### IV. TEXAS JURISPRUDENCE

Although Texas courts have an established tradition of enforcing *in terrorem* provisions, this area of the law is currently unsettled because no statute or Texas Supreme Court case exists that directly addresses whether Texas imposes the good faith, probable cause exception. This section details the development of Texas law relating to no-contest clauses and demonstrates how Texas has reached its current state of un-

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any interested person from contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings."

157. See, e.g., CAL. PROB. CODE § 21306 (Deering 1991). This statute provides that "[a] no contest clause is not enforceable against a beneficiary to the extent the beneficiary, with probable cause, brings a contest that is limited to either or both of the following grounds: (a) Forgery; (b) Revocation." In addition, CAL. PROB. CODE § 21307 provides:

A no contest clause is not enforceable against a beneficiary to the extent the beneficiary, with probable cause, contests a provision that benefits any of the following persons:

(a) A person who drafted or transcribed the instrument.

(b) A person who gave directions to the drafter of the instrument concerning dispositive or other substantive contents of the provision or who directed the drafter to include the no contest clause in the instrument, but this subdivision does not apply if the transferor affirmatively instructed the drafter to include the contents of the provision or the no contest clause.

(c) A person who acted as a witness to the instrument.

See also N.Y. ESTATE, POWERS, AND TRUST LAW § 3-3.5(b) (McKinney 1981). This statute provides:

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.

However, the *in terrorem* clause is not effective against an infant or an incompetent bringing a contest, regardless of probable cause. *Id.* § 3-3.5(b)(2) ("An infant or incompetent may affirmatively oppose the probate of a will without forfeiting any benefit thereunder.").

158. See UNIF. PROBATE CODE § 3-905; MCGOVERN, *supra* note 3, at 586 (noting that Uniform Probate Code does not enforce *in terrorem* provision when contest brought with probable cause).

159. RESTATEMENT (SECOND) OF PROPERTY § 9.1 (1983) ("An otherwise effective provision in a will or other donative transfer, which is designed to prevent the acquisition or retention of an interest in property in the event there is a contest of the validity of the document transferring the interest or an attack on a particular provision of the document, is valid, unless there was probable cause for making the contest or attack."). See generally Robert C. Reed, Note, *No-Contest Clause in Wills*, 23 U. PITT. L. REV. 767, 772-73 (1962) (discussing original *Restatement's* limitation of the probable cause exception to situations involving revocation by a later will or forgery).

certainty, which reduces the ability of testators and beneficiaries to accurately predict the results of their actions, whether it be to include *in terrorem* provisions or to contest a will in the face of such clauses.

#### A. THE EARLY CASES: *IN TERROREM* CLAUSES ENFORCED WITHOUT REGARD TO THE REASON FOR THE CONTESTS

Texas lower courts have, in two instances, upheld without qualification, the validity of *in terrorem* provisions.<sup>160</sup> Both cases, *Massie v. Massie*,<sup>161</sup> litigated in 1908, and *Perry v. Rogers*,<sup>162</sup> decided in 1908, established the strict application of *in terrorem* provisions by decreeing absolute forfeiture without reference to the beneficiary's good faith or whether the beneficiary had probable cause to bring the contest.<sup>163</sup> Neither contestant filed a writ of error to the Texas Supreme Court, thereby leaving the decisions without higher court review.

#### B. TEXAS SUPREME COURT APPROVES THE GOOD FAITH, PROBABLE CAUSE EXCEPTION, BUT ONLY IN DICTA

The first Texas case to acknowledge the existence of the probable cause exception was the 1932 Texas Supreme Court opinion of *Calvery v. Calvery*.<sup>164</sup> Although the court found that the contestant's suit was outside the scope of the *in terrorem* provision and therefore was not a contest of the will,<sup>165</sup> the court nonetheless stated that "[t]he great weight

160. See *Massie*, 118 S.W. at 219 (declaring absolute forfeiture because child of testator alleging property that was devised under father's will was community property rather than separate property, which would in effect disrupt disposition of estate and thwart testator's intent); *Perry v. Rogers*, 114 S.W. 897, 899 (Tex. Civ. App. 1908, no writ) (finding that trespass-to-try-title suit and partition of property was contest to challenge disposition of property); see also Jack, *supra* note 7, at 728 (summarizing holdings and rationale for invoking strict forfeiture); Catalano, *supra* note 100, at 617 (surveying *Perry* decision and court's rationale). See generally *Validity and Enforceability*, *supra* note 3, at 374-76 (discussing case law authority that holds *in terrorem* provisions are valid and enforceable).

161. 118 S.W. 219 (Tex. Civ. App. 1909, no writ).

162. 114 S.W. 897 (Tex. Civ. App. 1908, no writ).

163. See *Massie*, 118 S.W. at 219 (ruling that *in terrorem* provision mandates absolute forfeiture without discussion of, or reference to the beneficiary's good faith or probable cause); *Perry*, 114 S.W. at 899 (decreeing absolute forfeiture without reference to probable cause); see also *Gunter v. Pogue*, 672 S.W.2d 840, 843 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.) (discussing *Perry* and *Massie* decisions noting their strict application of forfeiture provisions without addressing probable cause exception); Joseph S. Horrigan, *Litigating Will Contests*, in STATE BAR OF TEXAS PROFESSIONAL DEVELOPMENT PROGRAM, 17TH ANNUAL ADVANCED ESTATE PLANNING AND PROBATE COURSE P-1, P-6 (1993) (acknowledging strict application of forfeiture provisions under *Perry* and *Massie* decisions). See generally Hugo M. Pfaltz, Jr., "In Terrorem" *Ne Terreamus*, 52 KY. L.J. 769, 772 (1964) (illustrating strict application of forfeiture provision by using *Perry* decision).

164. 55 S.W.2d 527, 530 (Tex. 1932) (stating in dicta that many jurisdictions adopt the good faith, probable cause exception); see also Jack, *supra* note 7, at 729 (indicating *Calvery* decision noted probable cause exception, but only in dicta); cf. Olin L. Brownder, Jr., *Testamentary Conditions Against Contest Re-Examined*, 49 COLUM. L. REV. 320, 337 (1949) (discussing *Calvery* decision and asserting that court held forfeiture provision is not violated if action proceeded under good faith and upon probable cause).

165. See *Calvery*, 55 S.W.2d at 530 (finding that beneficiary initiated action to obtain construction of will to ascertain whether her devised interest was in fee simple or a life

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."<sup>166</sup> The court tempered this observation by stating, "We do not intend to declare whether a forfeiture would result from a suit merely to ascertain the intent of a testator, regardless of the contestant's good faith and regardless of the existence of probable cause for the institution of the suit. No such case is before us."<sup>167</sup> Notwithstanding this limitation, lower courts have subsequently used *Calvery* as evidence of the court's likely approval of the probable cause exception when such a case is eventually presented.<sup>168</sup>

### C. MODERN CASES

#### 1. Status of Good Faith, Probable Cause Exception Unclear

The first case after *Calvery* to address the probable cause exception was *First Methodist Episcopal Church South v. Anderson*,<sup>169</sup> decided in 1937. The Dallas Court of Civil Appeals, relying on *Calvery*, asserted the existence of the probable cause exception to forfeiture by stating, "[W]e do not think a suit brought in good faith and upon probable cause to ascertain the intention of the testator . . . should be construed as an effort

estate); Jack, *supra* note 7, at 729 (surveying *Calvery* decision and noting suit was to construe will to ascertain interest in land).

166. *Calvery*, 55 S.W.2d at 530; accord *Haynes v. First Nat'l State Bank of N.J.*, 432 A.2d 890, 902-904 (N.J. 1981) (discussing split of authority in applying forfeiture exception but favoring majority of states that apply exception upon probable cause); *Elder*, 120 A.2d at 818 (surveying authority favoring probable cause exception); see also *BOWE & PARKER*, *supra* note 5, § 44.29, at 471 (discussing the exception to strict forfeiture if a contest is brought in good faith and asserting that the exception conforms with public policy). But see *Womble*, 95 S.E.2d at 217 (asserting position denying exception to forfeiture based upon majority of jurisdictions); *Cocklin*, 17 N.W.2d at 135 (expressing strong disagreement with *Calvery* assessment of numerical weight of authority upholding exception to forfeiture). See generally *Validity and Enforceability*, *supra* note 3, at 376-81 (surveying authority upholding and denying exception to strict forfeiture if contest based on good faith and probable cause).

167. *Calvery*, 55 S.W.2d at 530-31; see Jack, *supra* note 7, at 729 (commenting upon court's decision in *Calvery* to construe will and court's statement that no case was before them to rule on the good faith and probable cause exception).

168. See *Hammer*, 819 S.W.2d at 673 (citing to *Calvery* and stating 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"); *Gunter*, 672 S.W.2d at 843-44 (surveying Texas case law concerning probable cause exception); *Hodge v. Ellis*, 268 S.W.2d 275, 287 (Tex. Civ. App.—Fort Worth 1954) (discussing probable cause exception to forfeiture and quoting *Calvery* and *First Methodist* decisions), *rev'd on other grounds*, 277 S.W.2d 900 (Tex. 1955); *First Methodist*, 110 S.W.2d at 1184 (citing to *Calvery* and asserting that "the great weight of authorities sustain the rule" that forfeiture will be denied when contest is brought under probable cause); see also Jack, *supra* note 7, at 729-31 (surveying Texas case law acknowledging good faith, probable cause exception).

169. 110 S.W.2d 1177 (Tex. Civ. App.—Dallas 1937, writ *dism'd*) (holding that suit was not "contest," but brought to ascertain extent of ownership in property devised to beneficiary under decedent's will); see Jack, *supra* note 7, at 729-30 (discussing *First Methodist* decision and noting suit brought to interpret will); Catalano, *supra* note 100, at 659 (stating that *First Methodist* court found suit instituted to interpret will and determine extent of property interest devised under will).

to vary the purpose and intention of the will."<sup>170</sup> The court did not address the issue of probable cause because the suit was brought to ascertain the extent of the beneficiary's bequest and, therefore, was not a contest.<sup>171</sup> However, the court implied that the action was beyond the scope of the forfeiture provision because it was brought upon probable cause.<sup>172</sup>

Similarly, in the 1954 case of *Hodge v. Ellis*,<sup>173</sup> a beneficiary filed a trespass-to-try-title suit to protect his interest in property devised under the will.<sup>174</sup> The Fort Worth Court of Civil Appeals, relying on *Calvery* and *First Methodist*, announced that the action was initiated in good faith and upon probable cause and, therefore, did not constitute grounds for forfeiture.<sup>175</sup> Relying upon reasoning similar to the *First Methodist* opinion, the *Hodge* court distinguished the suit from an action brought to thwart the testator's desires as stated in the will; however, the court noted that had the suit been a contest, the forfeiture provision would be operative.<sup>176</sup>

Notwithstanding both courts' admissions that probable cause was not in issue, neither decision represents a correct delineation and application of the principles of the probable cause exception.<sup>177</sup> To properly apply

170. *First Methodist*, 110 S.W.2d at 1184; see *Gunter*, 672 S.W.2d at 843 (discussing *First Methodist* announcement that suit brought under good faith and upon probable cause should not be defeated by forfeiture provision); *Cocklin*, 17 N.W.2d at 135 (asserting *First Methodist* decision announced approval of good faith and probable cause exception because of strong support by numerous jurisdictions); Kuelthau, *supra* note 73, at 532 (describing *First Methodist* opinion as recognizing good faith, probable cause exception).

171. See *First Methodist*, 110 S.W.2d at 1184.

172. See *id.* The court stated that the beneficiary's action was for the purpose of interpreting the will and determining the extent of ownership in property received under the will rather than one to thwart the testator's desires. See also Leavitt, *supra* note 2, at 73 (citing *First Methodist* case as support for contention that declaratory action brought to construe will is not contest within scope of *in terrorem* provision); Catalano, *supra* note 100, at 659 (stating that *First Methodist* court found suit instituted to interpret will and determine extent of property interest devised under will).

173. 268 S.W.2d 275 (Tex. Civ. App.—Fort Worth 1954), *rev'd on other grounds*, 277 S.W.2d 900 (Tex. 1955).

174. See *id.* at 287 (recognizing that suit was initiated by beneficiary to establish title to real estate because although property was held in deceased wife's name, property was purchased with community funds, therefore, making real estate community property, which effected distribution of estate).

175. See *id.* (citing to *Calvery* and concluding that the trespass-to-try-title suit was instituted in good faith and upon probable cause because of absence of a showing of bad faith).

176. See *id.*; see also Jack, *supra* note 7, at 730 (discussing *Hodge* decision and noting court's assertion that because suit brought in good faith and upon probable cause, it was not intended to thwart testator's will and thus forfeiture would not be appropriate); Kuelthau, *supra* note 73, at 532 (citing *Hodge* for support in asserting that majority of states recognize good faith, probable cause exception to forfeiture).

177. See, e.g., *Ryan*, 70 S.E.2d at 855-56 (finding probable cause for initiation of suit precludes invoking forfeiture provision); *Haynes*, 432 A.2d at 904 (declining to enforce *in terrorem* provision when action brought upon probable cause and in good faith); *Seymour*, 600 P.2d at 278 (declaring that when contest brought in good faith and upon probable cause forfeiture will not be invoked). A prerequisite to the application of the probable cause exception precluding forfeiture under the *in terrorem* provision is that the action of the beneficiary must be determined to be a "contest" that challenges the testator's will or any of its provisions. See, e.g., HAW. REV. STAT. ANN. § 560:3-905; MINN. STAT. ANN.

the probable cause exception, the beneficiary's suit must initially be categorized as a "contest,"<sup>178</sup> i.e., a suit brought to thwart the testator's intent.<sup>179</sup> Once the suit is established as a contest, forfeiture must occur unless the court subsequently determines that the beneficiary brought the action in good faith and had probable cause for so doing.<sup>180</sup> Accordingly, these holdings of the Texas lower courts should not be taken as an indication that the courts declined to permit forfeitures because of the existence of probable cause. Instead, the holdings merely reflect that the courts found that the beneficiary's action to ascertain the intent of the testator was outside the scope of a "contest," placing the suit beyond the purview of the forfeiture provision in the first place.

In 1983, the Corpus Christi Court of Appeals shed additional light on the judiciary's thinking with regard to the probable cause exception in the case of *Gunter v. Pogue*.<sup>181</sup> Although the suit was a direct contest of the testator's will by three beneficiaries, the trial court refused to enforce the

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§ 524.2-517; N.J. STAT. ANN. § 3B:3-47 ("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."); see also UNIF. PROBATE CODE § 3-905 (providing that beneficiary does not forfeit gift if contest upon probable cause).

178. See *In re Hesse's Estate*, 157 P.2d 347, 349 (Ariz. 1945) (asserting that legal questions involved in construction of will or to ascertain meaning of validly executed will are not grounds of contest that would trigger forfeiture). The court held that any litigated proceeding concerning the eligibility of an instrument to probate, as distinguished from the validity of its contents, is considered to be a contest challenging testator's intended disposition, which triggers the forfeiture provision. *Id.* See also *Hodge*, 268 S.W.2d at 287 (finding that forfeiture must follow if purpose of suit is to thwart testator's intent). See generally Catalano, *supra* note 100, at 590 (defining "contest" as a term of art meaning a proceeding to disrupt testator's intended disposition by invalidating will); BLACK'S LAW DICTIONARY 320 (6th ed. 1990) (defining contest as, "To controvert, litigate, call in question, challenge," and as specifically used in a no-contest provision as "any legal proceedings designed to thwart testator's wishes").

179. See, e.g., *Hesse*, 157 P.2d at 349 (asserting will "contest" is any kind of litigated controversy concerning the eligibility of an instrument to probate as distinguished from the effect of the provisions of will); *In re Estate of Morris*, 577 S.W.2d 748, 752 (Tex. Civ. App.—Amarillo 1979, writ ref'd n.r.e.) (defining "contest" of will as direct attack upon decree admitting will to probate); *In re Estate of Hottermann*, 23 Cal. Rptr. 685, 690 (Cal. Dist. Ct. App. 1962) (declaring "contest" as any legal proceeding which is designed to thwart testator's wishes as stated in his will); see also RESTATEMENT (SECOND) OF PROPERTY § 428 cmt. c (1983) (defining "contest" as proceeding intended to challenge probate of will by asserting improper execution, undue influence, fraud, or lack of testamentary capacity); JOSEPH H. MURPHY, 1 MURPHY'S WILL CLAUSES § G15, at 1-61 (1993) (stating that proceeding instituted to challenge will is behavior that invokes forfeiture provision).

180. See *In re LeFranc's Estate*, 239 P.2d 617, 619 (Cal. 1952) (establishing that suit initiated to invalidate testator's will by claiming that testator was of unsound mind was contest intended to thwart testator's intended disposition); see also *Veltmann v. Damon*, 696 S.W.2d 241, 246 (Tex. App.—San Antonio) (noting forfeiture provision conditional upon intention of contestant to disrupt testator's intended disposition), *aff'd in part, rev'd in part*, 701 S.W.2d 247 (Tex. 1985).

181. 672 S.W.2d 840 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.); see also 10 ALOYSIUS A. LEOPOLD & GERRY W. BEYER, TEXAS LAW OF WILLS § 52.9, at 465 (2d ed. 1992) (identifying *Gunter* decision as perhaps one of most thorough discussions of viability of the good faith, probable cause exception).

forfeiture required by the *in terrorem* provision.<sup>182</sup> The non-contesting beneficiaries asserted that the trial court erred in not giving effect to the forfeiture provision because the exception for good faith and probable cause did not exist in Texas, and, in the alternative, they argued that the contesting beneficiaries did not receive a finding that their contest was brought under the exception.<sup>183</sup>

Although the appellate court agreed with the non-contesting beneficiaries and reversed the trial court, the appellate court dismissed the appeal without making a determination on whether the probable cause exception exists in Texas.<sup>184</sup> The appellate court focused its attention on the non-contesting beneficiaries' argument that, even if the exception existed in Texas, the contestants did not meet the burden of proof necessary to defeat a forfeiture based upon probable cause.<sup>185</sup> The appellate court concluded by stating that if the contestants intended to utilize the probable cause exception "it was incumbent upon them to secure a finding on good faith and probable cause from the judge or jury,"<sup>186</sup> which they never accomplished.

In *Hammer v. Powers*,<sup>187</sup> decided in 1991, the Fort Worth Court of Appeals gave its opinion of the status of the probable cause exception. Without ruling on whether to recognize the exception, the court cited the *Gunter* decision in announcing that to avoid forfeiture, the contestants must plead and prove their good faith and probable cause in contesting the will.<sup>188</sup> Consequently, the court upheld the trial court's summary judgment ruling, finding that the contestants failed to plead or offer any

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182. See *Gunter*, 672 S.W.2d at 841. The testator had written four wills during the three years before his death; the second, third, and fourth instruments contained forfeiture clauses. See *id.* The beneficiaries filed a will contest and offered will number one for probate, which did not contain the forfeiture provision. See *id.* at 842. The jury found wills number one, three, and four defective, and the court subsequently admitted the second will to probate. See *id.*

183. See *id.* at 842.

184. See *id.* at 843-44 (acknowledging Texas case law history concerning *in terrorem* provisions and uncertainty of good faith, probable cause exception, but asserting that issue was not before them for determination).

185. See *id.* at 844-45 (summarizing allocation of burden and discussing necessary proof needed to establish probable cause exception). Although the trial court refused to uphold the forfeiture provision, the trial judge refused to make any finding on the good faith, probable cause issue, which precluded the presentment of the issue to the appellate court for determination. See *id.*

186. *Id.* at 845 (at trial, the appellees failed to introduce evidence on good faith, probable cause in defense of their challenge to the probate of the will, which defeated any possibility of utilizing the exception even if it existed).

187. 819 S.W.2d 669 (Tex. App.—Fort Worth 1991, no writ).

188. See *id.* at 673; accord *Friend*, 58 A. at 856 (declaring that contestant had burden of showing that probable cause existed to contest validity of will); see also ATKINSON, *supra* note 3, § 82, at 409 (recognizing that contestant with burden of proof must show contestant acted with probable cause); JOSEPH H. MURPHY, 2A MURPHY'S WILL CLAUSES § A6, at 110 (Supp. 1993) (surveying allocation of burden of proof in asserting defense of probable cause and citing opinion of *Hammer* as illustrative); Lynne McNeil Candler, *Annual Survey of Texas Law: Wills and Trusts*, 46 SMU L. REV. 1831, 1833-34 (1993) (discussing *Hammer* decision and allocation of burden of proof).

evidence of probable cause.<sup>189</sup>

Although these and many other Texas appellate opinions have touched peripherally on the good faith, probable cause exception by implying a general recognition of the exception in Texas case law,<sup>190</sup> the dominant focus of the courts in recent decisions has been the threshold issue of defining the triggering conduct.<sup>191</sup> As a result, courts can easily evade a direct holding on the validity of the probable cause exception once they determine that the beneficiary's conduct is not a contest in the first place and thus does not trigger the *in terrorem* provision.<sup>192</sup>

Based on these cases, an *in terrorem* provision is not triggered by the commencement of an action in which a beneficiary seeks to: (1) recover a property interest in devised or bequeathed property;<sup>193</sup> (2) compel an ex-

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189. See *Hammer*, 819 S.W.2d at 673; accord *Haynes*, 432 A.2d at 904 (finding that action asserted in good faith and upon probable cause amply supported by evidence in record); see also *Horrigan*, *supra* note 163, at P-8 (summarizing *Hammer* court's recognition of probable cause exception as affirmative defense that must be pled and allocation of burden of proof upon contestant); *Candler*, *supra* note 188, at 1833 n.29 (discussing *Hammer* decision and noting absence of pleadings and proof prohibited court from providing finding on probable cause).

190. See, e.g., *First Methodist*, 110 S.W.2d at 1184 (citing to *Calvery* and asserting that "the great weight of authorities sustain the rule" that forfeiture will be denied when contest is brought under probable cause); *Hodge*, 268 S.W.2d at 287 (discussing probable cause exception to forfeiture and quoting *Calvery* and *First Methodist* decisions); *Gunter*, 672 S.W.2d at 843-44 (surveying Texas case law concerning probable cause exception); see also *Browner*, *supra* note 164, at 338 (indicating Texas case law history of discussing probable cause exception in favorable manner, which is taken as indication of acceptance in Texas).

191. See, e.g., *Veltmann*, 696 S.W.2d at 246 (determining validity of deed through suit did not contest terms of will); *Sheffield v. Scott*, 662 S.W.2d 674, 677 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.) (finding that mere filing of an action without further action does not trigger forfeiture clause); *Reed*, 569 S.W.2d at 648 (identifying suit as one brought to ascertain testator's intent); *McGaffey v. Walker*, 379 S.W.2d 390, 396 (Tex. Civ. App.—Eastland 1964, writ ref'd n.r.e.) (finding suit brought upon insistence that testator's last will be probated not falling within *in terrorem* provision precluding forfeiture); *Hodge*, 268 S.W.2d at 287 (reporting action brought as trespass-to-try-title claim); *Roberts v. Chisum*, 238 S.W.2d 822, 825 (Tex. Civ. App.—Eastland 1951, no writ) (ascertaining that proceeding was brought for will construction); *Bethurum v. Browder*, 216 S.W.2d 992, 995 (Tex. Civ. App.—El Paso 1948, writ ref'd n.r.e.) (identifying proceeding as action brought to partition in kind property received); *Upham v. Upham*, 200 S.W.2d 880, 883 (Tex. Civ. App.—Eastland 1947, writ ref'd n.r.e.) (holding suit initiated for will construction and accounting).

192. See, e.g., *Gunter*, 672 S.W.2d at 843-44 (announcing that case was disposed of without deciding whether exception to forfeiture exists in Texas because the issue was not before court); *In re Estate of Minnick*, 653 S.W.2d 503, 507-08 (Tex. App.—Amarillo 1983, no writ) (concluding suit filed for accounting, partition, and distribution not contest of will); *Dulak v. Dulak*, 496 S.W.2d 776, 782 (Tex. Civ. App.—Austin 1973) (filing suit for damages to property claimed under will not to contest will precluding ruling on probable cause exception), *aff'd in part, rev'd in part*, 513 S.W.2d 205 (Tex. 1974).

193. See *Upham*, 200 S.W.2d at 883. The issue raised was whether the property devised was the separate or community property of the testator, and, therefore, the court held that the suit was not a "contest" intended to thwart the intent of the testator, but was merely a request for the construction of the will. See *id.*; accord *South Norwalk Trust Co.*, 101 A. at 963 (holding that when action is merely one to ascertain construction of will, it will not violate forfeiture provision because object of suit is to determine true legal meaning); *Wells v. Menn*, 28 So. 2d 881, 885 (Fla. 1946) (determining that where purpose of suit is to ascertain interests under will and not for purpose of challenging will, courts cannot invoke forfeiture); *Leavitt*, *supra* note 2, at 73, n.119 (citing *Upham* for authoritative support that declaratory action brought to interpret will is not challenge to will within *in terrorem* provi-



ecutor to perform duties;<sup>194</sup> (3) ascertain a beneficiary's interest under the will;<sup>195</sup> (4) compel a court to probate the last will of a testator;<sup>196</sup> (5) recover damages for the conversion of assets that were devised or bequeathed to a contesting beneficiary;<sup>197</sup> (6) construe a provision of the testator's will;<sup>198</sup> (7) request an accounting, partition, or distribution of

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sion). See generally Catalano, *supra* note 100, at 637-41 (asserting that it is uniformly recognized that an action for construction of will or any of its provisions for determination of rights and duties under it does not bring action and beneficiary within forfeiture provision).

194. See *Bethurum*, 216 S.W.2d at 992. When it appeared that the executor did not settle the estate in a timely manner, the court held that the beneficiary, in bringing suit to compel the executor to perform his duties as required under the will, did not "contest" the will. See *id.* at 995; accord *In re Estate of Ikuta*, 639 P.2d 400, 407 (Haw. 1981) (holding that beneficiaries who contested petition for final accounts did not fall under definition of "contest" because action was to construe will); *In re McGovern's Estate*, 250 P. 812, 818 (Mont. 1926) (ruling that beneficiaries who initiated suit to compel executor to render final accounting, settle estate, and deliver possession of real estate to them did not fall within definition of "contest"). See generally Catalano, *supra* note 100, at 655-61 (discussing authority stating that proceedings brought against executors for accounting are not "contests" under *in terrorem* provisions).

195. See *Roberts*, 238 S.W.2d at 825 (holding the beneficiaries' suit was to determine the meaning of ambiguous and uncertain language in a will that prohibited the beneficiaries from ascertaining the nature of their gifts under the will, not a contest); accord *Black v. Herring*, 28 A. 1063, 1065 (Md. 1894) (stating that it was improper to determine that beneficiary bringing suit to ascertain interests under will was seeking to thwart intent of testator); *George v. George*, 141 S.W.2d 558, 560 (Ky. 1940) (proceeding for declaratory judgment to determine interest under will due to ambiguous language); *In re Ervin's Estate*, 79 A.2d 264, 265 (Pa. 1951) (determining that suit was brought to construe will by referring to entire instrument); Leavitt, *supra* note 2, at 73 (citing *Roberts* as authoritative support for assertion that declaratory suit brought to interpret will's language is not within provision as "contest"); see also BOWE & PARKER, *supra* note 5, § 44.29, at 473-74 (acknowledging that suit brought to ascertain interest in property devised under will is not a "contest").

196. See *McGaffey*, 379 S.W.2d at 396 (holding an action to compel the court to probate the last will of testator was not within scope of no-contest provision); see also BOWE & PARKER, *supra* note 5, § 44.29, at 474 (discussing authority denying forfeiture when beneficiary challenges will admitted to probate with another instrument claimed to be proper will). See generally Catalano, *supra* note 100, at 637-41 (surveying authority that state's forfeiture will be denied if beneficiary is instituting suit other than attack on testator's intended disposition of property).

197. See, e.g., *Dulak*, 496 S.W.2d at 779-80 (beneficiary's action to recover damages for the conversion of assets prior to the testator's death that were devised to him under the will did not trigger forfeiture), *aff'd in part, rev'd in part*, 513 S.W.2d 205 (Tex. 1974); accord *In re Estate of Dow*, 308 P.2d 475, 481 (Cal. Ct. App. 1957) (holding action to enforce claim against estate for value of stocks that were separate property, but had been converted by testator for own use, not to be considered "contest" of testator's will). See generally Catalano, *supra* note 100, at 692-93 (discussing authority denying forfeiture upon action brought on assertion of claim based on tort or wrongful act).

198. See, e.g., *Reed*, 569 S.W.2d at 645 (holding in response to contention that suit for declaratory judgment initiated to construe provision of the testator's will had violated the forfeiture provision, that beneficiaries had not forfeited their interest because the suit was to ascertain and enforce the testator's intent); accord *Hicks v. Rushin*, 185 S.E.2d 390, 392 (Ga. 1971) (concluding that will's *in terrorem* provision prohibiting contests did not apply to declaratory action, which was search for true legal meaning of testator's intent); *Dravo v. Liberty Nat'l Bank & Trust Co.*, 267 S.W.2d 95, 98-99 (Ky. 1954) (taking position that suit for declaratory judgment as to whether proposed action would violate forfeiture provision in testator's will was not intended to thwart testator's intent, but merely to ascertain meaning of instrument by construction of will); see also MCGOVERN ET AL., *supra* note 3, at 586 (citing *Reed* decision as supporting the assertion that suits brought to construe testator's will despite being unsuccessful do not result in forfeiture); Catalano, *supra* note 100,

estate assets;<sup>199</sup> (8) contest a deed that conveyed a beneficiary's interest;<sup>200</sup> (9) determine the effect of a family settlement agreement;<sup>201</sup> (10) challenge another beneficiary's appointment as executor;<sup>202</sup> (11) seek redress from executors for breach of their fiduciary duties;<sup>203</sup> and (12) tes-

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at 651 (surveying court's decision in *Reed*, which found suit brought to ascertain interest under will); Jack, *supra* note 7, at 731 (discussing how courts determine what constitutes contest of will).

199. See *Minnick*, 653 S.W.2d at 507-08 (stating that it is well settled that requests for accounting, partition, and distribution of estate assets are not contests within the terms of *in terrorem* provisions); *Upham*, 200 S.W.2d at 883 (holding declaratory judgment for will construction and accounting is not within definition of contest); *Bethurum*, 216 S.W.2d at 995 (declaring that an action to compel partition in kind not considered contest); see also Catalano, *supra* note 100, at 667-72 (discussing authority declaring proceedings for accounting or settlement of estate not "contest" within *in terrorem* provisions).

200. See *Veltmann*, 696 S.W.2d at 246 (determining that intent of testator was undisturbed by suit to contest subsequent deed to property that was already devised under will and outside estate of testator); see also MURPHY, *supra* note 188, § A2, at 117-18 (discussing *Gunter* decision and noting that contestant asserted deed was made under undue influence but action was not typical action within scope of *in terrorem* provision that would constitute contest and trigger forfeiture); Catalano, *supra* note 100, at 718-19 (surveying *Veltmann* decision and indicating that suit initiated to set aside transfer of beneficiary's interest did not trigger forfeiture).

201. See *Hodges*, 725 S.W.2d at 268 (finding suit brought to ascertain whether forfeiture would result from attempted family settlement agreement was not action intended to attack will and thus did not cause forfeiture). See generally Catalano, *supra* note 100, at 651 (discussing *Hodges* decision and reasoning behind holding).

202. See, e.g., *In re Estate of Newbill*, 781 S.W.2d 727, 729 (Tex. App.—Amarillo 1989, no writ) (determining that challenging an executor's qualifications does not constitute challenging validity of will); *In re Estate of Hamill*, 866 S.W.2d 339, 345 (Tex. App.—Amarillo 1993, no writ) (acknowledging suit brought to challenge appointment of executor is not an action to thwart distribution under will, but to carry out wishes of testator that executor be qualified); accord *Estate v. Lewy*, 113 Cal. Rptr. 674, 678-79 (Cal. Ct. App. 1974) (holding that beneficiary's unsuccessful attempt to prevent executor from serving for lack of capacity was not "contest"); see also BOWE & PARKER, *supra* note 5, § 44.29, at 111-12 (acknowledging authority declaring challenge to executor's qualifications is not "contest" of will); Candler, *supra* note 188, at 675 (discussing *Newbill* decision asserting that challenge to co-beneficiary's appointment as executor does not violate *in terrorem* provision); cf. *Sheffield*, 662 S.W.2d at 675 (quoting testator's *in terrorem* provision, which states that "no such devisee or legatee or beneficiary shall in any manner contest . . . or oppose the appointment of my Independent Executor in any judicial proceeding"); *Geisinger v. Geisinger*, 41 N.W.2d 86, 89 (Iowa 1950) (holding that action of beneficiary did not come within provisional language prohibiting any heir from causing "trouble or disturbance" in conjunction to change in named executor in codicil to original will).

203. See *McLendon v. McLendon*, 862 S.W.2d 662, 679 (Tex. App.—Dallas 1993, writ denied) (suit against executors for breach of their fiduciary duties under the will did not challenge the validity of the will, but rather questioned the execution of the will's instructions by the executors, and therefore, as a matter of law, action fell outside the forfeiture provision); accord *Jackson v. Braden*, 717 S.W.2d 206, 208 (Ark. 1986) (holding that action against executor for alleged breach of fiduciary duties not "contest" within forfeiture provision); *Cohen v. Reisman*, 48 S.E.2d 113, 114-15 (Ga. 1948) (determining beneficiary would not forfeit bequest under will for instituting suit against executor for alleged breach of fiduciary duties). See generally Catalano, *supra* note 100, at 672-76 (discussing authority on issue of invoking forfeiture for initiating suit against executor on assertions of misconduct); ATKINSON, *supra* note 3, § 82, at 412 (noting claims against executor are generally held to be outside forfeiture provision). But see *Estate of Wojtalewicz v. Woitel*, 418 N.E.2d 418, 420-21 (Ill. 1981) (declaring that beneficiary's conduct within provisional language mandating forfeiture, but that it is against public policy to require forfeiture).

tify in a contest brought by other beneficiaries.<sup>204</sup>

Even if the beneficiary's conduct is deemed a contest, courts have nonetheless been able to avoid directly ruling on whether the good faith, probable cause exception is followed in Texas. For example, in *In re Estate of Hamill*,<sup>205</sup> the Amarillo Court of Appeals held that the beneficiary's suit actually was a contest because the beneficiary's pursuit of an appeal of a will contest after reaching the age of majority fell within the scope of the clause thereby invoking a forfeiture.<sup>206</sup> Although the finding that a bona fide contest had been instituted would normally raise the issue of whether the beneficiary brought the suit in good faith and with probable cause, the court did not address the exception because the contesting beneficiary neglected to file a brief and place the issue before the appellate court.<sup>207</sup>

## 2. Mere Filing Of Contest May Be Insufficient to Trigger Forfeiture

Two appellate courts have addressed the issue of whether the beneficiary's act of filing a contest is in itself enough to come within the scope of an *in terrorem* clause. In the 1983 case of *Sheffield v. Scott*,<sup>208</sup> the Houston Court of Appeals for the Fourteenth District announced that the mere filing of a suit, without more, was not a contest intended to challenge the intent of the testator.<sup>209</sup> The court stated that a motion, in and

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204. See *Hazen v. Cooper*, 786 S.W.2d 519, 520 (Tex. App.—Houston [14th Dist.] 1990, no writ) (forfeiture provision expressly prohibited beneficiary from contesting "or in any manner whatsoever directly or indirectly aid[ing] in any such contest or questioning," however, the court held that a non-contesting beneficiary's act of testifying during trial did not trigger a forfeiture citing public policy that denying inheritance because of testimony from non-contesting beneficiary would discourage full disclosure of facts and circumstances); see also *Horrigan*, *supra* note 163, at P-7, P-8 (surveying *Hazen* decision and noting public policy argument by court that penalty for testifying should not be invoked because of possible restraint on attaining truth); *Candler*, *supra* note 188, at 673 (discussing *Hazen* decision). Accord *Haley v. Pickelsimer*, 134 S.E.2d 697, 703 (N.C. 1964) (ruling that providing aid to minor daughter who challenged testator's will did not result in mother forfeiting her gift); *Elder*, 120 A.2d at 821 (holding widow's appearance in son's contest of testator's will did not come within purview of forfeiture provision). See also *BOWE & PARKER*, *supra* note 5, § 44.29, at 474 (concluding that entering voluntary testimony at trial does not violate *in terrorem* provision). But see *In re Estate of Simpson*, 595 A.2d 94, 100 (Pa. Super. Ct. 1991) (holding that aid provided to contestant by non-contesting beneficiaries fell within forfeiture provision and invoked forfeiture). See generally *Catalano*, *supra* note 100, at 708-11 (reviewing case law on application of *in terrorem* provisions on aid provided by non-contesting beneficiaries to contesting beneficiaries).

205. 866 S.W.2d 339 (Tex. App.—Amarillo 1993, no writ).

206. See *id.* at 343.

207. See *id.*

208. 662 S.W.2d 674 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.).

209. See *id.* at 677; accord *Wells v. Menn*, 28 So. 2d 881, 885 (Fla. 1947) (holding that merely filing of caveat against probate of will does not constitute contest intended to thwart intent of testator); *Ayers v. Ayers*, 279 S.W. 647, 649 (Ky. 1926) (asserting that despite filing objection to probate and alleging invalid execution, lack of mental capacity, and undue influence, withdrawal of motion barred action from falling under *in terrorem* provision). But see *Cross v. French*, 177 A. 456, 457 (N.J. Ch. 1935) (indicating filing of motion to contest probate of will sufficient to trigger *in terrorem* provision). See generally *Pfaltz*, *supra* note 163, at 777 (discussing jurisdictional conflict upon declaring mere filing contest to be within *in terrorem* provision); *Catalano*, *supra* note 100, at 627-30 (surveying

of itself, is not self-proving and that it is only a pleading that is a necessary vehicle to raise issues.<sup>210</sup> Additionally, the court maintained that because the suit was dismissed prior to a hearing and because the testator had not expressly prohibited the "mere filing" of a contest, the petition itself was insufficient to invoke a forfeiture.<sup>211</sup>

Subsequently, the *Sheffield* case was cited with approval by the Amarillo Court of Appeals in *In re Hamill*.<sup>212</sup> The *Hamill* court agreed that the filing and dismissal of the suit by the contesting beneficiary was insufficient to come within the purview of the *in terrorem* clause.<sup>213</sup> The significance of the rulings in *Sheffield* and *Hamill* is that they appear to authorize a forfeiture immediately upon the filing of a contest if the *in terrorem* provision expressly stipulates that the mere filing of a contest is a triggering event.<sup>214</sup>

### 3. Testator's Ability to Waive the Good Faith, Probable Cause Exception Is Uncertain

The uncertainty of the existence of the good faith, probable cause exception to forfeiture has led many testators to incorporate language in their *in terrorem* provisions triggering forfeiture regardless of the contestant's good faith or probable cause.<sup>215</sup> However, there is no clear authority regarding whether this type of language would be effective if Texas were to adopt the good faith, probable cause exception.<sup>216</sup> Despite this uncertainty, an express waiver of the exception stands a good chance of

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authority on whether objection to probate that is subsequently withdrawn triggers forfeiture).

210. See *Sheffield*, 662 S.W.2d at 677; accord *In re Estate of Hite*, 101 P. 443, 447 (Cal. 1909) (stating that "[i]t does not follow herefrom that the mere filing of a paper contest, which has been abandoned without action, and has not been employed to thwart the testator's expressed wishes, need be judicially declared a contest").

211. See *Sheffield*, 662 S.W.2d at 677. But see *South Norwalk Trust Co.*, 101 A. at 962 (determining that although beneficiary who initially appealed from order admitting will to probate, but subsequently instructed counsel not to pursue appeal, nonetheless forfeited bequest). See generally *Validity and Enforceability*, *supra* note 3, at 31 (discussing holding and reasoning in the *Sheffield* case).

212. 866 S.W.2d 339 (Tex. App.—Amarillo 1993, no writ).

213. See *id.* at 345. See generally *BOWE & PARKER*, *supra* note 5, § 44.29, at 475 (noting that forfeiture provision denied effect when initial action is subsequently withdrawn); *Jack*, *supra* note 7, at 731 n.47 (discussing cases holding forfeiture prevented by withdrawing suit prior to judicial proceeding).

214. See *Hamill*, 866 S.W.2d at 345 (indicating that the court's decision finds mere filing insufficient to trigger *in terrorem* provision, but that the court may have reached different conclusion if the provision had expressly provided that mere filing was enough to invoke forfeiture).

215. See, e.g., *id.* at 339; *Dulak*, 496 S.W.2d at 781; accord *Eversal v. Scarth*, 787 P.2d 470, 472 (Okla. Ct. App. 1990). See generally *MURPHY*, *supra* note 188, § A6, at 77 (providing Texas form of *in terrorem* provision, which provides forfeiture "regardless of whether or not such proceedings are instituted in good faith and with probable cause").

216. See *Hamill*, 866 S.W.2d at 341 n.3 (determining issues before court without reference to provisional language that mandated forfeiture "regardless of whether such proceeding is instituted in good faith and with probable cause"); *Dulak*, 496 S.W.2d at 781 (declaring beneficiary's action not "contest" without referring to provisional language authorizing forfeiture despite action being brought in good faith and upon probable cause).

being given effect even under the established principle of strictly construing forfeiture provisions.<sup>217</sup> On the other hand, a court might not uphold the waiver if it decides that the waiver is contrary to public policy or if the court's desire to ensure a will's validity exceeds the court's responsibility to uphold the testator's intent to prevent will contests.<sup>218</sup>

#### 4. *Writ Histories Add to Unpredictability*

When analyzing Texas cases from the lower appellate courts, the writ histories of the cases must be considered because of the impact they have on the precedential value of the cases.<sup>219</sup> When the Texas Supreme Court refuses a writ of error without any further designation, the opinion has the same precedential weight as a full decision from the court.<sup>220</sup> Unfortunately, no Texas *in terrorem* cases bear the "writ refused" designation. Instead, the majority of cases involving *in terrorem* provisions that were appealed to the Supreme Court of Texas were refused a writ of error with the indication that there was no reversible error.<sup>221</sup> The "no reversible"

217. See, e.g., *McLendon*, 862 S.W.2d at 678 (stressing *in terrorem* provisions narrowly construed to fulfill testator's expressed intent); accord CAL. PROB. CODE § 21304 (Deering 1991) (providing that "[i]n determining the intent of the transferor, a no contest clause shall be strictly construed"). See generally *BOWE & PARKER*, *supra* note 5, § 44.29, at 471 (describing unpopularity of forfeitures with courts and stating that such clauses are strictly construed); *Horrigan*, *supra* note 163, at P-1, P-5-6 (acknowledging that forfeiture provisions are invoked only when action of beneficiary comes strictly within prohibited conduct); Herman F. Selvin, Comment, *Terror in Probate*, 16 STAN. L. REV. 355, 356 (1964) (reiterating that because forfeiture provisions are so severe, they must be strictly construed by court); *Catalano*, *supra* note 100, at 611 (discussing provisions invoking forfeitures and strict adherence to their terms).

218. See *Hazen*, 786 S.W.2d at 520-21 (establishing that a broad forfeiture provision that prohibited providing aid by one non-contesting beneficiary to contesting beneficiary at the expense of losing bequest is against public policy based upon consideration that witness required to be truthful, which aids in determining validity of instrument); accord *Porter v. Baynard*, 28 So. 2d 890, 897 (Fla. 1946) (stressing that authorities are in conflict regarding strict enforcement of *in terrorem* provisions and noting that authorities favoring exception based upon probable cause argue testator did not intend to prevent beneficiary from having his uncertain rights judicially determined); *Seymour*, 600 P.2d at 278 (finding that public policy positions in conflict due to desire to enforce intent of testator and ensure will's validity under circumstances). See generally *Horrigan*, *supra* note 163, at P-1, P-7-8 (noting *Hazen* court's insistence upon independent testimony without fear of repercussion); Selvin, *supra* note 217, at 364 (discussing in detail opposing public policy arguments of strict enforcement of *in terrorem* provisions).

219. See TEXAS LAW REVIEW, TEXAS RULES OF FORM 22-24, 82-85 (9th ed. 1997) (discussing meaning of the various ways the Texas Supreme Court disposes of applications for writs of error). See generally Ted Z. Robertson & James W. Paulsen, *The Meaning (If Any) of an "N.R.E.,"* 48 TEX. B.J. 1306, 1306 (1985) (discussing relative precedential values placed upon cases depending on their writ histories).

220. See *Hamilton v. Empire Gas & Fuel Co.*, 110 S.W.2d 561, 565-66 (Tex. 1937); *Ohler v. Trinity Portland Cement Co.*, 181 S.W.2d 120, 123 (Tex. Civ. App.—Galveston 1944, no writ). See generally TEXAS RULES OF FORM, *supra* note 219, at 82 (explaining meaning of "writ ref'd" designation).

221. See, e.g., *Gunter*, 672 S.W.2d at 840; *Sheffield*, 662 S.W.2d at 674; *Reed*, 569 S.W.2d at 645; *McGaffey*, 379 S.W.2d at 390; *Bethurum*, 216 S.W.2d at 992; *Upham*, 200 S.W.2d at 880. A substantial number of Texas cases concerning the application of *in terrorem* provisions and the probable cause exception were not reviewed by the Supreme Court of Texas. See, e.g., *Minnick*, 653 S.W.2d at 503; *Roberts*, 238 S.W.2d at 822. Three cases went before the Supreme Court of Texas and obtained some measure of substantive action upon the

error designation greatly limits the precedential value of these cases.<sup>222</sup> In substance, the "n.r.e." designation means that the Supreme Court of Texas is not satisfied that the court of appeals has correctly declared the law, but finds that the final result presents no error requiring reversal.<sup>223</sup> Although the court no longer uses the "n.r.e." designation, its replacement, "writ denied," is quite similar in that it reflects that the court is not satisfied that the lower court correctly declared the law but believes that there was no error which requires reversal or which is sufficiently important to the jurisprudence of Texas to merit correction.<sup>224</sup>

## V. LEGISLATIVE SOLUTION

Testators and settlors expect that property dispositions contained in their wills and trusts will take effect as written. To enhance the likelihood of this occurring, testators often include *in terrorem* provisions. It is frustrating to these Texas citizens and the attorneys who counsel them that the effect of no-contest clauses is uncertain due to a lack of statutory authority and the non-definitive nature of the existing judicial opinions. The ability of Texas testators to preserve their estates, protect their privacy, and prevent family animosities by avoiding post-mortem litigation is problematic. This section discusses the wisdom of a legislative solution and concludes with a proposed statute.

### A. POLICIES SUPPORTING STATUTORY RECOGNITION OF *IN TERROREM* PROVISIONS WITH LIMITED PROBABLE CAUSE EXCEPTIONS

In drafting an *in terrorem* statute, the Texas legislature could follow any of the approaches discussed in Section II of this Article. The authors urge that the Texas legislature provide its citizens with a comprehensive statute that places a priority on the property owner's intentions and removes the uncertainty from the probate law. Deeming *in terrorem* clauses valid subject to limited good faith, probable cause exceptions is the best approach in that it carefully balances the donor's desires to control the disposition of the donor's property with the court's responsibility

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case. See *Veltmann*, 696 S.W.2d at 246, *aff'd in part, rev'd in part*, 701 S.W.2d 247 (Tex. 1985); *Dulak*, 496 S.W.2d at 782, *aff'd in part, rev'd in part*, 513 S.W.2d 205 (Tex. 1974); *Hodge*, 268 S.W.2d at 287, *rev'd on other grounds*, 277 S.W.2d 900 (Tex. 1954). One case was dismissed, which denotes the case was dismissed without examining the merits of the appeal because of the lack of jurisdiction, mootness, or the case was settled by agreement of the parties. See *First Methodist*, 110 S.W.2d at 1177.

222. See TEXAS RULES OF FORM, *supra* note 219, at 83 (explaining meaning of "writ ref'd n.r.e." designation); Robertson & Paulsen, *supra* note 219, at 1306-16 (analyzing precedential value of cases receiving the "n.r.e." designation).

223. See TEXAS RULES OF FORM, *supra* note 219, at 82 (explaining meaning of "writ ref'd n.r.e." designation); Robertson & Paulsen, *supra* note 219, at 1306 (discussing precedential value placed on cases denied writ of error); Gordon Simpson & Kate Wall, *Problems of Precedent Affecting Court of Civil Appeals Opinions*, 4 Sw. L.J. 398, 402 (1950) (asserting that placement of "n.r.e." designation is plague on civil appeals opinions).

224. See TEXAS RULES OF FORM, *supra* note 219, at 85 (explaining meaning of "writ denied" designation).

of making sure beneficiaries and heirs have the ability to pursue their legal rights without fearing unjustified consequences.

### 1. *Prioritizes Grantor's Intent*

"[T]he function of the court is to effect the testator's intent to the greatest extent possible within the bounds of the law."<sup>225</sup> "It has been repeatedly stated that the intention of the testator is the 'polar star of construction' to which all other rules must yield. Thus, a will must be construed according to the intention of the testator, no matter how unusual or unreasonable his intention may be."<sup>226</sup> When an *in terrorem* provision is used, the grantor intends to condition the gifts of each beneficiary on that beneficiary not attempting to alter the dispositive scheme and, thus, the provision should be given effect, unless enforcement violates a positive rule of law or public policy.<sup>227</sup> "Only a paramount public interest would warrant [any] abridgment of the inherent right of testamentary disposition."<sup>228</sup> As discussed below, none of the public policy arguments advanced for not enforcing these provisions rise to the level necessary to overcome the priority the law places on testamentary intention and, therefore, *in terrorem* provisions should be enforced because they represent the clearly expressed intention of testators and settlors.<sup>229</sup>

### 2. *Prevents Vexatious Litigation*

The Texas legislature should favor *in terrorem* clauses because they deter unwarranted litigation. In recent years, court dockets have been overburdened due to the dramatic increase in litigation.<sup>230</sup> Public policy has always favored the reduction of litigation as evidenced by the 1869 declaration by the Supreme Court of Ohio that "nothing can be more in conformity to good policy than to prevent litigation."<sup>231</sup> Forty years later, the Supreme Court of California reiterated this policy in the context of an *in terrorem* provision.

225. *Seymour*, 600 P.2d at 278.

226. *In re Robinson's Estate*, 68 Cal. Rptr. 420, 423 (Cal. Ct. App. 1968); see also Begleiter, *supra* note 14, at 633 (citing *In re Gustafson*, 547 N.E.2d 1152, 1153-54 (N.Y. 1989)); *Dainton*, 658 P.2d at 81; 4 WILLIAM J. BOWE & DOUGLAS H. PARKER, PAGE ON THE LAW OF WILLS § 30.1, at 2 (rev. ed. 1961); Michael Hancher, *Dead Letters; Wills and Poems*, 60 TEX. L. REV. 507, 514 (1982).

227. See *Alper*, 65 A.2d at 740-41; *Seymour*, 600 P.2d at 278; Begleiter, *supra* note 14, at 634.

228. *Alper*, 65 A.2d at 741.

229. See, e.g., *Meech*, 169 U.S. at 415; *Burtman v. Burtman*, 85 A.2d 892, 895 (N.H. 1952); *Alper*, 65 A.2d at 741; *Dainton*, 658 P.2d at 81. See generally Begleiter, *supra* note 14, at 631.

230. See Begleiter, *supra* note 14, at 635 (citing 1991 IOWA ST. CR. ADMINISTRATOR ANN. STAT. REP. 82; Don J. DeBenedictis, *L.A. Log-On*, 76 A.B.A. J. 50 (1990); Stephen Reinhardt, *Too Few Judges, Too Many Cases*, 79 A.B.A. J. 52 (1993); Frank Santiago, *New Study Shows More Judges Are Needed in State*, DES MOINES REGISTER, Mar. 31, 1993, at 3M; Frank Santiago, *Iowa Courts Ailing*, DES MOINES REGISTER, Jan. 15, 1993, at 1M, 3M).

231. *Bradford*, 19 Ohio St. at 548 (1869).

Preliminary, it is to be observed that [an *in terrorem* clause], not only does no violence to public policy, but meets with the approval of that policy. Public policy dictates that the courts of the land should be open, upon even terms, to all suitors. But this does not mean that it invites or encourages litigation. To the contrary, it deploras litigation. "*Interest reipublicae ut sit finis litium*," ["It concerns the state that there be an end of lawsuits"<sup>232</sup>] and the great statute of frauds and perjuries, and the laws limiting the time of the commencement of actions, with many other of its rules and doctrines, are all designed to give repose and security by prevention of litigation.<sup>233</sup>

Research reveals that the vast majority of will contests based on allegations of undue influence, lack of mental capacity, or defective execution fail, and, consequently, are vexatious.<sup>234</sup> These meritless contests often "waste away vast estates, by protracted and extravagant litigation."<sup>235</sup> Both the delay and reduction in the estate caused by litigation may have a devastating effect on the beneficiaries of the will or trust. Thus, *in terrorem* provisions should be legislatively sanctioned because they are "valuable will [and trust] devices [that] serve to protect estates from costly and time-consuming litigation."<sup>236</sup>

### 3. Reduces Family Animosity

Testators and settlors have legitimate reasons for wanting to avoid contests and their concomitant results. "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 [their] general unhappiness . . . . Thus, a will contest may bring sorrow and suffering to many concerned."<sup>237</sup> "Such contests often breed irreconcilable family feuds, and lead to disgraceful family exposures."<sup>238</sup>

Testators and settlors may prefer to leave their property to friends or charities if they know their family might be torn apart as a result of a

232. Leavitt, *supra* note 2, at 60 (translating Latin phrase "*Interest reipublicae ut sit finis litium*," to mean "It concerns the state that there be an end of lawsuits").

233. *Hite*, 101 P. at 444.

234. *See, e.g., Barry v. American Sec. & Trust Co.*, 135 F.2d 470, 473 (D.C. Cir. 1943)

Studies which have been made show that only a very small percentage of will contests made on the grounds of defective execution, mental incapacity or undue influence are successful; and the public interest in freeing such contests from the restraining influence of conditions like that here involved seems of little importance compared with enforcing the will of the testator that those who share in his bounty shall not have been guilty of besmirching his reputation or parading the family skeletons after his death.

*Id.*; *Bender v. Bateman*, 168 N.E. 574, 575 (Ohio Ct. App. 1929) (stating "the great majority of [will contest] cases will result only in the affirmance of the will"). *See generally* Begleiter, *supra* note 14, at 635.

235. *Donegan*, 70 Ala. at 505. *See also South Norwalk Trust Co.*, 101 A. at 963 (noting that will contests "result in a waste of estates through expensive and long drawn out litigation").

236. *Seymour*, 600 P.2d at 278. *See also Alper*, 65 A.2d at 740 (observing that "[t]he restraint is defended as a device to lessen the wastage of the estate in litigation").

237. *Rudd v. Searls*, 160 N.E. 882, 886 (Mass. 1928).

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



drawn out challenge to their will or trust. *In terrorem* provisions with gifts over to these alternate beneficiaries provide a simple way for donors to “minimize family bickering over the competence and capacity of testators, and the various amounts bequeathed.”<sup>239</sup> Because *in terrorem* clauses may promote the “peace and harmony of the living”<sup>240</sup> and reduce “the chance of increasing family animosities,”<sup>241</sup> the Texas legislature should expressly approve *in terrorem* clauses to respect the donor’s wishes and preserve the family unit.

#### 4. *Protects Post-Death Privacy*

The United States Supreme Court in 1898 recognized that will contests often bring “to light matters of private life that ought never to be made public, and in respect to which the voice of the testator can not be heard either in explanation or denial; and, as a result, the manifest intention of the testator is thwarted.”<sup>242</sup> The 1928 Supreme Judicial Court of Massachusetts articulated this important policy for upholding *in terrorem* clauses as follows:

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 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.<sup>243</sup>

*In terrorem* clauses are often inserted into dispositive instruments to prevent heirs from “besmirching the reputation of the testator when he is no longer alive to defend himself.”<sup>244</sup> Although the property owner could choose to leave the heir nothing or merely a nominal sum, such action would not entice the dissatisfied heir to refrain from contesting the will. However, if the heir is given a relatively large gift, but still considerably less than the heir would receive under intestacy, the heir may make the self-serving decision to forego the potentially unsuccessful contest and be satisfied with the “sure thing.” In a sense, the conditional gift represents compensation given by the testator in consideration for the heir refraining from “besmirching his reputation or parading the family

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239. *Seymour*, 600 P.2d at 278 (discussing policy behind probable cause exception to protect estates from costly litigation and lessen chance of family animosities over testator’s capacity and bequests).

240. *Rudd*, 160 N.E. at 886.

241. *Alper*, 65 A.2d at 740.

242. *Meech*, 169 U.S. at 415.

243. *Rudd*, 160 N.E. at 886.

244. *Alper*, 65 A.2d at 740.

skeletons.”<sup>245</sup> If the heir instead elects to forgo the conditional gift, and, as a result of the litigation, the testator falls into disrepute and “the family skeletons [are] made to dance,”<sup>246</sup> then the *in terrorem* clause should be given effect as the property owner intended. The law should not allow the heirs who fail to carry their burden in setting aside a testamentary instrument to take a conditional gift under that instrument unless the testator’s conditions are met. The Texas legislature should validate *in terrorem* clauses because they “may contribute to the fair reputation of the dead.”<sup>247</sup>

##### 5. *Rights of Property Owners to Enjoy Property Not Affected*

Proponents of the approach followed in states such as Indiana and Florida, where *in terrorem* clauses are ineffective, often quote Chancellor Wardlaw’s dissenting opinion in the South Carolina case of *Mallet v. Smith* where he argued that:

[i]t is the interest of the State that every legal owner should enjoy his estate, and that no citizen should be obstructed by risk of forfeiture from ascertaining his rights by the law of the land. . . . [I]t 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.<sup>248</sup>

Upon close analysis, *in terrorem* clauses are not actually in conflict with this assertion. The principle that “every legal owner should enjoy his estate”<sup>249</sup> is self-evident, at least to the extent that the rights of others are not impinged. This principle, however, relates to the testator or settlor who is the legal owner of the property to be transferred. Property ownership is often analogized to the holding of a bundle of sticks, with each stick representing a property right. The owner of the property holds all the sticks in the bundle, including the right to transfer the property to whomever the owner selects. The potential heirs of property owners do not hold any of the sticks and may be completely disinherited.<sup>250</sup> The presumptive heirs only have a hope of receiving a gift in the future if the property owner neglects to execute a valid will. Therefore, deeming *in terrorem* provisions valid would not interfere with the right of owners to enjoy their estates, but would instead further strengthen this right by allowing property owners to place conditions on the testamentary gifts they choose to make of their property.

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245. *Barry*, 135 F.2d at 473.

246. *Bender*, 168 N.C. at 575.

247. *Rudd*, 160 N.E. at 886.

248. *Mallet v. Smith*, 28 S.C. Eq. 12, 20 (1853) (Wardlaw, C., dissenting).

249. *Id.*

250. See TEX. PROB. CODE ANN. § 58(b)(1) (Vernon 1980 & Supp. 1997).

## 6. *In Terrorem Provisions Do Not Actually Cause Forfeiture*

For many centuries, common law courts have repeatedly stated that the law abhors a forfeiture. An *in terrorem* clause, however, does not place a beneficiary at risk of forfeiture. Forfeiture occurs when a person loses property to which that person had a legal right. An *in terrorem* clause merely puts a condition on a gift; the beneficiary must comply with the condition to obtain the property. Thus, violation of the *in terrorem* clause does not cause a true forfeiture, but rather prevents the beneficiary from obtaining an interest in the property in the first instance.

## 7. *Contesting Beneficiary or Heir Has No Right to Ancestor's Property*

Opponents of *in terrorem* provisions apparently deduce the property right of an heir to the ancestor's estate from intestacy law.<sup>251</sup> "The law abhors intestacy"<sup>252</sup> and, therefore, "presumes against it"<sup>253</sup> and "favors testacy over intestacy."<sup>254</sup> Only when property owners die without expressing their testamentary intent does the law favor intestate succession over the alternative, which would be to allow the property to escheat to the state. When a property owner dies with an instrument defining the owner's testamentary intention, however, the heir's expectancy under intestacy law vanishes, leaving the heir with no rights in the property owner's estate (except for the protections provided by statute for the surviving spouse, children, and, in some jurisdictions, pretermitted children).

## 8. *Heirs May Still Contest Instrument*

The most powerful argument opposing the validity of *in terrorem* provisions is that these clauses contradict the fundamental goal of the judicial system "to discover the truth from differing assertions of facts, and out of that truth to determine the rights and duties of the parties before it."<sup>255</sup> An *in terrorem* provision, however, does not prevent an heir from challenging the property owner's will or trust. It only gives the heir the grantor's message that "although I am not required to, I have chosen to make a gift to you; if you do not respect what I have done and try to upset my disposition in an attempt to receive a larger share of my property, then I do not want you to have any of my property."

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251. See Koren, *supra* note 60, at 191.

252. *In re Estate of Ikuta*, 639 P.2d 400, 406 (Haw. 1981) (quoting *In re Weill's Trust Estate*, 406 P.2d 718, 724 (1965)); see also *Montclair Trust Co. v. Luper*, 130 A.2d 858 (N.J. Super. Ct. App. Div. 1957); *Spell v. Traxler*, 93 S.E.2d 601 (S.C. 1956); *Rhode Island Hosp. Trust Co. v. Thomas*, 54 A.2d 432, 440 (R.I. 1947).

253. *Weill*, 406 P.2d at 724; see also *Tobler v. Moncrief*, 178 A.2d 105, 108 (N.J. Super. Ct. Ch. Div. 1962); *Hackensack Trust Co. v. Bogert*, 93 A.2d 402, 405 (N.J. Super. Ct. App. Div. 1952).

254. *In re Estate of Teubert*, 298 S.E.2d 456, 458 (W. Va. 1982); see also *In re Oliverio's Will*, 415 N.Y.S.2d 335, 337 (N.Y. Sur. 1979); *In re Estate of Edwards*, 97 P. 23, 23 (Cal. 1908).

255. Koren, *supra* note 60, at 192.

Heirs always have the right to contest.<sup>256</sup> If they elect to exercise this option, they are only required to prove their allegation by a preponderance of the evidence, the lowest of the standard burdens of proof. Therefore, an *in terrorem* clause does not inhibit anyone's access to the judicial system. Rather, it simply adds one more uncertainty to the litigation. Contestants in any litigation must consider a number of risks in deciding whether to bring a lawsuit, including time commitments, legal fees, court costs, emotional stress, and the exposure to counterclaims that may not otherwise have been brought. An *in terrorem* clause gives the contestant another reason to investigate and refrain from bringing a suit based on weak or unfounded assertions. As the Supreme Court of Missouri wrote in *Rossi v. Davis*, the contestant

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.<sup>257</sup>

### 9. Duty of Court to Probate Valid Wills Not Compromised

Proponents of *in terrorem* provisions argue that these clauses violate public policy as they impede the flow of information necessary for the court to make a proper determination of the validity of wills. These clauses have a chilling effect on meritorious contests, especially in jurisdictions that have not adopted a good faith, probable cause exception. Without full information, the court may not discover the truth and consequently probate an invalid will.<sup>258</sup> This argument is based on the premise that public policy requires that the courts admit to probate only those instruments that meet the applicable statutory requirements and that are made by testators who possessed the requisite capacity and were not unduly influenced.<sup>259</sup>

This premise, however, is not completely supported by the real world behavior of probate courts. Courts typically refuse to probate a will only when someone raises an objection. Likewise, courts rarely take the initiative to investigate the validity of a will. Further, the heirs and beneficiaries have no duty, either by judicial creation or statute, to challenge

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256. See TEX. PROB. CODE ANN. § 10 (Vernon 1980) ("Any person interested in an estate may, at any time before any issue in any proceeding is decided upon by the court, file opposition thereto in writing and shall be entitled to process for witnesses and evidence, and to be heard upon such opposition, as in other suits"); TEX. PROP. CODE § 115.011(a) (Vernon 1995) ("Any interested person may bring an action under Section 115.001 of this Act."); *id.* § 115.001(a) (addressing "all proceedings concerning trusts.").

257. *Rossi*, 133 S.W.2d at 372. See also *Moran v. Moran*, 123 N.W. 202, 206 (Iowa 1909) (stating "[t]he question he has to decide is the ordinary one which arises in nearly every business transaction—whether the thing offered him is worth the price demanded"). See also Begleiter, *supra* note 14, at 679 n.108 (comparing choice beneficiary is faced with to settlement offers in typical law suit and pointing out that all conditional bequests require beneficiary to give up a legal right, i.e., trust income conditioned on beneficiary refraining from remarriage or smoking).

258. See Begleiter, *supra* note 14, at 641 (citing cases).

259. See *id.*

the validity of a will,<sup>260</sup> even if they know the will failed to meet the formal requirements, was the product of undue influence or coercion, or was made while the testator lacked capacity. Therefore, the courts are required to carefully consider the validity of an alleged will "if and only if the matter is raised by one of the parties."<sup>261</sup> There is, in reality, no duty on the courts to admit to probate only those wills that meet all the elements of validity.<sup>262</sup>

#### 10. *Surviving Spouses and Minor Children Adequately Protected*

Opponents of the enforceability of *in terrorem* provisions argue that the surviving spouse and minor children cannot afford the risk of losing testamentary gifts and, thus, will hesitate to contest the deceased spouse's will, even if a good ground to do so exists.<sup>263</sup> Texas law, however, has already established adequate protections for surviving spouses and minor children. To start with, the surviving spouse already owns one-half of the community property, and, thus, the deceased spouse's will and its no-contest clause can only affect the deceased's separate property and share of community. The Texas Probate Code's family allowance provisions require the court to order the deceased spouse's estate to support a needy surviving spouse and minor children for one year.<sup>264</sup> The Texas pretermitted child statute protects certain children of the decedent who were born or adopted after will execution, even if they are adults and suffer no financial hardship.<sup>265</sup> The Texas legislature has also expressly authorized testators to disinherit their heirs.<sup>266</sup> Additional protection through the non-recognition of *in terrorem* clauses is not necessary.<sup>267</sup>

#### 11. *Broad Probable Cause Exception Negates Effectiveness of In Terrorem Provisions*

Texas courts have never directly defined probable cause. Many courts that recognize the exception have articulated a definition. For example, probable cause to contest a will is found to exist 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."<sup>268</sup> Under definitions such as this, a court could always find that the contestant had probable cause and set aside the *in terrorem* clause, merely because the contestant relies on an

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260. See, e.g., *Bradford*, 19 Ohio St. at 547-48; *Elder*, 120 A.2d at 819; *Cooke*, 153 Eng. Rep. at 1047. See generally *Begleiter*, *supra* note 14, at 642.

261. *Begleiter*, *supra* note 14, at 642.

262. See *id.*

263. See *Barry*, 135 F.2d at 473 (Miller, J., concurring in part, dissenting in part).

264. See TEX. PROB. CODE ANN. §§ 286-293 (Vernon 1980 & Supp. 1997).

265. See *id.* § 67.

266. See *id.* § 58 (Vernon Supp. 1997).

267. See generally *Begleiter*, *supra* note 14, at 648.

268. *Geisinger v. Geisinger*, 41 N.W.2d 86, 93 (Iowa 1950).

attorney's representation that there is a reasonable chance that the contest could succeed. Thus, the Texas legislature should not adopt an unrestricted good faith, probable cause exception but rather a narrow exception only for contests based on grounds such as forgery<sup>269</sup> and revocation.<sup>270</sup> Total rejection of the good faith, probable cause exception is not warranted because it would permit nefarious individuals to "unscrupulously play upon the feelings of the testator . . . with impunity, [and to] enjoy the fruits of their iniquity, and laugh in scorn at those whom they have wronged."<sup>271</sup>

## B. RECOMMENDED STATUTE

### PROBATE CODE SECTION 59B — IN TERROREM CLAUSES<sup>272</sup>

#### (a) **Definitions**<sup>273</sup>

As used in this section:

- (1) "Beneficiary" means a person to receive benefits under an instrument.
- (2) "Contest" means an attack in a proceeding on an instrument which, if successful, would result in the instrument or any provision thereof being declared invalid.<sup>274</sup>
- (3) "Good faith" means that a beneficiary honestly believes that the instrument or a provision thereof is invalid.
- (4) "Instrument" includes a valid will and a valid trust.
- (5) "*In terrorem* clause" means a provision in an otherwise valid instrument that penalizes the beneficiary who brings the contest by eliminating or reducing the gift to that beneficiary.

269. The public has an interest in discovering crimes. *See Alper*, 65 A.2d at 740; Begleiter, *supra* note 14, at 650 (citing 28 HALSBURY, THE LAWS OF ENGLAND 585 (1914)).

270. A revoked instrument would no longer reflect the transferor's intent and, thus, the beneficiary should be able to contest the instrument in good faith and upon probable cause.

271. *Friend*, 58 A. at 854.

272. Because the proposed provision applies to both wills and trusts, the Texas Trust Code should be amended to contain either (a) a reference to this section, or (b) a parallel provision. The first option is preferred to prevent the application of different rules to wills and trusts should the legislature amend one of the provisions without making a conforming amendment to the other.

273. This section is based on § 21300 of the California Probate Code, which states:

§ 21300. Definitions

As used in this part:

(a) "Contest" means an attack in a proceeding on an instrument or on a provision in an instrument.

(b) "No contest clause" means a provision in an otherwise valid instrument that, if enforced, would penalize a beneficiary if the beneficiary brings a contest.

274. The definition of "contest" excludes actions to construe or interpret the will. "If the action . . . is merely one to determine the true construction of the will, or of any of its parts, the action could not be held to breach the ordinary forfeiture clause, for the object of the action is not to make void the will, or any of its parts, but to ascertain its true legal meaning." *South Norwalk Trust Co.*, 101 A. at 963.

(6) "Probable cause" means that the beneficiary reasonably believes in the existence of facts and law which would permit that beneficiary to successfully contest the instrument.

(7) "Transferor" includes the testator/testatrix of a valid will and the settlor of a valid trust.

**(b) *In Terrorem Instrument***<sup>275</sup>

(1) A transferor may provide in the terms of the instrument that the gift of a beneficiary is subject to an express *in terrorem* clause contained in the instrument and may draft the *in terrorem* clause to be applicable to any or all of the beneficiaries under the instrument. The express *in terrorem* provision may provide an alternate beneficiary in the event the beneficiary violates the *in terrorem* provision. Absent any express terms, the forfeited gift will pass under the terms of the instrument as if the beneficiary predeceased the transferor without surviving descendants.<sup>276</sup>

(2) A declaration in an instrument that it is an "*in terrorem instrument*" is sufficient to prevent the vesting of all interests in any beneficiary who initiates, joins, or voluntarily testifies in a contest of the instrument. Any interest which does not vest due to this provision will pass under the terms of the instrument as if the beneficiary predeceased the transferor without surviving descendants.

(3) An instrument containing the terms authorized under subsection (1) or (2) of this section may be referred to as an "*in terrorem instrument*."

(4) A transferor may not prevent the application of the exceptions contained in subsections (e) or (f) of this section.

**(c) *Construction of In Terrorem Clauses***<sup>277</sup>

Courts shall construe *in terrorem* clauses strictly in determining the intent of the transferor.

**(d) *Enforcement of In Terrorem Clause***<sup>278</sup>

Except to the extent otherwise provided in subsections (e) and (f) of this section, an *in terrorem* clause is enforceable against a beneficiary who

275. This section is based on § 112.035 of the Texas Property Code, which describes the creation of spendthrift trusts. TEX. PROP. CODE ANN. § 112.035 (Vernon 1995).

276. The beneficiary is treated as predeceasing the transferor without "surviving descendants" to prevent the application of a substituted gift for the transferor's children, either under the instrument or via an application of the anti-lapse statute. TEX. PROB. CODE ANN. § 68 (Vernon 1980 & Supp. 1997). Without this language, a child could contest a parent's will knowing that the only penalty associated with failure would be for the property to pass to the child's descendants.

277. The section is based on § 21304 of the California Probate Code ("In determining the intent of the transferor, a no contest clause shall be strictly construed.").

278. This section is based on § 21303 of the California Probate Code ("Except to the extent otherwise provided in this part, a no contest clause is enforceable against a beneficiary who brings a contest within the terms of the no contest clause.") and § 3-3.5 of the New York Estate, Powers, & Trusts Law, which reads as follows:

§ 3-3.5 Conditions qualifying dispositions; conditions against contest; limitations thereon

(a) A condition qualifying a disposition of property is operative despite the failure of the testator to provide for an alternative gift to take effect upon the breach or non-occurrence of such condition.

brings a contest within the prohibitions of the *in terrorem* clause, regardless of whether (a) the beneficiary brought the contest in good faith, (b) the beneficiary had probable cause for bringing the contest, or (c) the transferor provided an alternate beneficiary in the event the beneficiary violated the *in terrorem* provision.

**(e) Exceptions to Enforceability<sup>279</sup>**

(1) An *in terrorem* clause is not enforceable against a beneficiary to the extent the beneficiary brings a contest in good faith and with probable cause that is limited to one or more of the following grounds:

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(b) 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.

N.Y. EST., POWERS, & TRUSTS LAW § 3-3.5 (McKinney 1981 & Supp. 1997).

279. This section is based on § 21306 of the California Probate Code, which reads as follows:

§ 21306. Exceptions to enforceability

A no contest clause is not enforceable against a beneficiary to the extent the beneficiary, with probable cause, brings a contest that is limited to one or more of the following grounds:

(a) Forgery.

(b) Revocation.

(c) An action to establish the invalidity of any transfer described in Section 21350.

(d) A petition to remove a trustee under paragraph (6) of subdivision (b) of Section 15642.

Section 21350 referred to in section 21306(c) above states in full:

§ 21350. Prohibited transferees; definitions

(a) Except as provided in Section 21351, no provision, or provisions, of any instrument shall be valid to make any donative transfer to any of the following:

(1) The person who drafted the instrument.

(2) A person who is related by blood or marriage to, is a cohabitant with, or is an employee of, the person who drafted the instrument.

(3) Any partner or shareholder of any law partnership or law corporation in which the person described in paragraph (1) has an ownership interest, and any employee of any such law partnership or law corporation.



- (i) Forgery,<sup>280</sup>
  - (ii) Revocation,<sup>281</sup>
  - (iii) An action to establish the invalidity of any transfer described in Section 61<sup>282</sup> or Section 69<sup>283</sup> of this Code,<sup>284</sup> or
  - (iv) A petition to remove an executor or trustee.
- (2) An *in terrorem* clause is not enforceable against a beneficiary to the extent the beneficiary contests a provision in good faith and with probable cause that benefits any of the following persons:
- (i) A person who drafted or transcribed the instrument, or
  - (ii) A person who gave directions to the drafter of the instrument concerning dispositive or other substantive contents of the provision or who directed the drafter to include the *in terrorem* clause in the instrument.<sup>285</sup>
- (3) An *in terrorem* clause is not enforceable against any beneficiary named in the instrument who does not voluntarily testify or join in the

(4) Any person who has a fiduciary relationship with the transferor, including, but not limited to, a conservator or trustee, who transcribes the instrument or causes it to be transcribed.

(5) A person who is related by blood or marriage to, is a cohabitant with, or is an employee of a person who is described in paragraph (4).

(b) For purposes of this section, "a person who is related by blood or marriage" to a person means all of the following:

- (1) The person's spouse or predeceased spouse.
- (2) Relatives within the third degree of the person and of the person's spouse.

(3) The spouse of any person described in paragraph (2).

In determining any relationship under this subdivision, Sections 6406, 6407, and Chapter 2 (commencing with section 6450) of Part 2 of Division 6 shall be applicable.

280. Where the contestant has probable cause of the commission of a crime, such as forgery, the law should not penalize the contestant. If the instrument was forged, then it does not represent the transferor's true intent. *See Rouse v. Branch*, 74 S.E. 133, 135 (S.C. 1912).

If a devisee should accept the fruits of the crime of forgery under the belief, and upon probable cause, that it was a forgery, he would thereby become morally a particeps criminis, and yet, if he is unwilling to commit this moral crime, be confronted with the alternative of doing so, or of taking the risk of losing all under the will, in case it should be found not to be a forgery.

*Id.*; see also *Alper*, 65 A.2d at 740.

281. A beneficiary should not risk forfeiture if the beneficiary is in good faith and has probable cause to believe that the instrument offered for probate was revoked. If the transferor revoked the instrument, it no longer represents the transferor's intentions with regard to property disposition.

282. *See* TEX. PROB. CODE ANN. § 61 (Vernon 1980) (voiding gifts to beneficiaries who are also subscribing witnesses).

283. *See id.* § 69 (Vernon 1980 & Supp. 1997) (voiding gifts to the testator's ex-spouse).

284. The Texas legislature has already deemed these types of gifts suspect and this exception carries forward its decision with regard to *in terrorem* clauses.

285. A good faith, probable cause exception is warranted for beneficiaries challenging gifts to individuals closely connected with the preparation of the instrument because these persons may have been so involved in the decision to include the *in terrorem* clause that they should not be allowed to utilize the provision to shelter their gifts from inquiry. *See* TEX. PROB. CODE ANN. § 58b (Vernon Supp. 1998).

This section is based on § 21307 of the California Probate Code, which provides:

§ 21307. Provision benefiting witness or person involved in drafting or transcribing instrument; contest; enforcement of clause

contest of the instrument when the contest is brought by any other person, regardless of whether the contestant is named or not named in the instrument.<sup>286</sup>

**(f) Declaratory Judgment<sup>287</sup>**

(1) If an instrument containing an *in terrorem* clause is or has become irrevocable, a beneficiary may apply to the court for a determination of whether a particular motion, petition, or other act by the beneficiary would be a contest within the terms of the *in terrorem* clause following the procedures provided by Chapter 37, Civil Practice and Remedies Code.

(2) If the court finds that the beneficiary's motion, petition, or other act would be a contest within the terms of the *in terrorem* provision, all costs of the action and the reasonable attorney fees of any person claiming that the beneficiary's motion, petition, or other act would be a contest, are chargeable against the beneficiary who sought the declaratory judgment.

A no contest clause is not enforceable against a beneficiary to the extent the beneficiary, with probable cause, contests a provision that benefits any of the following persons:

- (a) A person who drafted or transcribed the instrument.
- (b) A person who gave directions to the drafter of the instrument concerning dispositive or other substantive contents of the provision or who directed the drafter to include the no contest clause in the instrument, but this subdivision does not apply if the transferor affirmatively instructed the drafter to include the contents of the provision or the no contest clause.
- (c) A person who acted as a witness to the instrument.

286. This clause would prevent an heir who is not named in the instrument or who is dissatisfied with the gift in the instrument from blackmailing other beneficiaries of the instrument with the threat of litigation and risk of forfeiture, where the *in terrorem* clause is worded broadly, e.g., "Any bequest made in this will is forfeited if this will is challenged by any heir." Likewise, this provision prevents forfeiture merely because a contestant subpoenaed a beneficiary to testify.

287. This section gives a beneficiary the opportunity to determine the nature of the proposed action so that the beneficiary may make an informed decision whether to continue with full notice of the risk involved. To prevent the overuse of this provision, beneficiaries who fail to demonstrate that their conduct is not a contest are responsible for all costs associated with the action, even the reasonable attorneys fees of individuals asserting that the conduct is actually a contest.

This section is based on § 21320 of the California Probate Code, which provides:

§ 21320. Irrevocable instruments; enforcement of clause

(a) If an instrument containing a no contest clause is or has become irrevocable, a beneficiary may apply to the court for a determination whether a particular motion, petition, or other act by the beneficiary, including, but not limited to, creditor claims under Part 4 (commencing with Section 9000) of Division 7 and Part 8 (commencing with Section 19000) of Division 9, would be a contest within the terms of the no contest clause.

(b) A no contest clause is not enforceable against a beneficiary to the extent an application under subdivision (a) by the beneficiary is limited to the procedure and purpose described in subdivision (a) and does not require a determination of the merits of the motion, petition, or other act by the beneficiary.

(c) A determination of whether Section 21306 or 21307 would apply in a particular case may not be made under this section.

(3) A request for a declaratory judgment does not violate an *in terrorem* provision regardless of the terms of the provision.

## VI. CONCLUSION

*In terrorem* provisions have a long and rich history. The clauses were approved by early common law courts and continue to be deemed valid in the majority of states. Although Texas originally treated the *in terrorem* clause as valid without exception, the lower courts have gradually clouded the doctrine with numerous different constructions. The lack of a definitive Supreme Court of Texas decision, coupled with the lower courts' varying opinions, renders the enforceability of *in terrorem* provisions in Texas uncertain. To provide a reliable method for testators and settlors to protect their dispositive plans from the attacks of disgruntled beneficiaries, the Texas legislature should clarify this murky area by enacting a comprehensive *in terrorem* statute. A statute, such as the one proposed above, would allow testators and settlors to create estate plans with enforceable *in terrorem* provisions designed to prevent dissatisfied individuals from overturning granting instruments and taking more than was intended via intestacy or a prior instrument.