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"In Terrorem" Ne Terreamus

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By Hugo M. Pfaltz, Jr.*

The hallmark of contemporary estate planning is that it is planned. One quickly senses the effort which has been devoted to such planning in the awesome volume of material which has been published on the subject and which continues unabated. Much of this literature is extremely particularized, and it is easy to wonder whether the popular search through the labyrinth of the Internal Revenue Code for often insignificant tax savings isn't degenerating into estate over-planning.[1] Nevertheless, there can be no doubt that thorough estate planning is absolutely necessary to insure the orderly transmission of accumulated property. The concept of thorough estate planning implies that maximum advantage has been taken of all of the legal arrangements which are available to achieve a testator's objectives. Thus, estate planning involves more than the mechanical application of standardized formulae or the incorporation of the latest tax saving scheme. It is axiomatic that estates must be treated individually, and those engaged in estate planning should be prepared to draw upon all available legal techniques in order to attain individual objectives. Some of these available techniques receive only scant recognition in contemporary literature relating to estate planning. This article considers one of these little recognized estate planning devices, the *in terrorem* clause, and suggests that, in the proper circumstances, the clause deserves to be brought out of its present obscurity.

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[1] See, *e.g.*, *A Unique Tax Parlay—Insurance Gifts With Strings*, P-H Practicing Attorneys Letter, July 17, 1963. This article shows in detail how a potential tax saving may be obtained by augmenting the federal estate tax marital deduction through an inter vivos transfer of life insurance to a charitable institution while retaining an incident of ownership to cause its inclusion in the computation of a decedent's adjusted gross estate. Int. Rev. Code of 1954, § 2042. The practical application of such a device is limited to charitably minded possesors of relatively large estates. Moreover the effect of adding property to the estate of the surviving spouse will often overcome any immediate tax saving.

The *in terrorem* clause, as its name implies, is intended to terrorize. Specifically, it is intended to terrorize into acquiescence those who might otherwise contest an estate disposition. Typically the *in terrorem,* or no contest, clause is a provision inserted in a will which provides that if any beneficiary contests the will such person shall forfeit the gift which has previously been provided by the testator.[2] Under such a provision an estate beneficiary is presented with a choice of either accepting the gift which has been given or hazarding the gift on the speculation that by upsetting the testator's estate plan such person will gain even more. If the contesting beneficiary is unsuccessful and the *in terrorem* clause is applied, his gift will be forfeited. If he is successful in his contest, the *in terrorem* provision is disregarded and such beneficiary takes the share of the estate which is otherwise provided by law. Thus, the typical *in terrorem* clause is a forthright and heavy-handed weapon. It leaves a beneficiary with an initial choice whether the gamble is worth the potential gain. Its *in terrorem* effect may be assessed by comparing the risk of loss with the opportunity for gain.

It should be noted that an *in terrorem* provision is merely one method of creating a conditional bequest, in this case a bequest conditional upon acquiescence in the testator's over-all estate disposition.[3] A decision to incorporate an *in terrorem* provision in a will does not involve considerations of public policy. Assuming that a testator is free to withhold his bequest in the first instance, the addition of a condition upon subsequent conduct should not be of public concern so long as the conduct which the clause seeks to control does not violate public policy. As one court observed:

> This [the *in terrorem* provision] was a matter of concern to the testator and his beneficiaries exclusively; the public interest was not involved. Testamentary dispositions are required to be enforced unless contrary to public policy or rule of law. Only a paramount public interest would warrant such abridgment of the inherent right of testamentary disposition.[4]

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[2] Suggested *in terrorem* provisions designed to avoid estate litigation will be found in 13 Am. Jur. Legal Forms § 13:2246-77 (1957); 3 Jones, Legal Forms § 67:100 (1962); 9A Nichols, Cyclopedia of Legal Forms § 9.117a-e (1963).

[3] See, Smithsonian Institution v. Meech, 169 U.S. 398 (1898); South Norwalk Trust Co. v. St. John, 92 Conn. 168, 101 Atl. 961 (1917); Elder v. Elder, 84 R.I. 13, 120 A.2d 815 (1956).

[4] Alper v. Alper, 2 N.J. 105, 114-15, 65 A.2d 737, 741 (1949).

While the traditional application of the *in terrorem* clause may appear unsophisticated, the clause may be applied with finesse to achieve specialized results. For example, in order to mitigate its rigors, the clause may merely demand that a will contestant bear the costs of such contest.[5] To broaden its scope, the clause can provide that the beneficiaries must acquiesce in the discretionary decisions of executors or trustees and not meddle in the continuing management of the estate.[6] Likewise, the effective coverage of the clause can be extended to include a forfeiture where a particular disposition is contested by a non-beneficiary, who, although having no direct interest in the estate, may be coerced into submission by the collateral effects of a forfeiture.[7]

A further sophistication of the *in terrorem* clause is a provision declaring that any beneficiary who asserts a claim against the estate[8] or who contests a disposition of particular property on the ground that it did not belong to the testator[9] will forfeit the gifts provided in the will. Such an application of the *in terrorem* clause is analogous to the equitable doctrine of election under which a beneficiary is obliged to choose between accepting a legacy or asserting an inconsistent claim.[10] While the *in terrorem* clause, when so applied, may be analogous to such an election,

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[5] *E.g.*, Hoit v. Hoit, 42 N.J. Eq. 388, 7 Atl. 856 (Ct. Err. & App. 1886), *reversing* Hoyt v. Hoyt, 40 N.J. Eq. 478, 2 Atl. 451 (Ch. 1886). *But c. f.*, *In re* Vom Saal's Will, 82 Misc. 531, 145 N.Y. Supp. 307 (Surr. Ct. 1913), where a court voided on grounds of public policy a provision shifting the costs of litigation to a party in a will construction suit, distinguishing a provision shifting the costs of a contest against the probate of a will.

[6] A clause prohibiting intermeddling has been upheld in England. Adams v. Adams [1892] 1 Ch. 369. However, no American decision was found which directly considers such a provision against intermeddling, although it would appear that such a continuing condition might be inferred from the language of some *in terrorem* clauses. See *In re* Lummins' Estate, 126 F. Supp. 379 (D.C. N.J. 1954). The American Law Institute takes the position that a forfeiture based on such a clause will be enforced where a beneficiary raises a contest without probable cause. Restatement, Property § 431 (1944). *But c.f.*, Cohen v. Reisman, 203 Ga. 684, 48 S.E.2d 113 (1948) (clause would violate public policy if applied in suit to compel executors to carry out provisions of will); see also *In re* Vom Saal's Will, *supra* note 5, refusing to charge contesting party with costs of will construction suit; language of *in terrorem* clause involved apparently would apply to continuing management of trust.

[7] *E.g.*, Alper v. Alper, *supra* note 4, *affirming* 142 N.J. Eq. 547, 60 A.2d 880 (Ch. 1948).

[8] *E.g.*, Rogers v. Law, 66 U.S. 253 (1861); *In re* Kitchen, 192 Cal. 384, 220 Pac. 301 (1923); *In re* Von Grimm's Will, 133 N.Y.S.2d 926 (Surr. Ct. 1954).

[9] *E.g.*, Smithsonian Institution v. Meech, *supra* note 3.

[10] For consideration of the equitable doctrine of election, see 5 Bowie-Parker, Page on Wills § 47 *passim* (1962).

there may often be a significance in the choice of alternative methods of accomplishing the same result. For example, a will provision requiring an election implies that the claimant has something to elect and can give dignity to what otherwise could be a relatively weak claim. A general *in terrorem* clause may raise no such implication.

A classic application of the *in terrorem* clause is illustrated in *Perry v. Rogers*,[11] decided by the Texas Court of Civil Appeals in 1908. According to the opinion in this case, it appears that one W. M. Perry had been married four times and had at least eleven children by three of his marriages. His estate consisted primarily of his community property interest in Texas farm lands. Apparently his basic estate planning problem was to make adequate provision for his children and yet preserve the economic viability of these farms. The lands were acquired as community property during his marriage to his first wife, who had since died. As a result, her heirs—his children by the first marriage—held a one-half undivided interest in the same farms. In order to effect a satisfactory division of the properties, it would be necessary to compel the children of his first marriage to acquiesce in his estate plan. Faced with this problem, the testator provided in his will that these lands should be divided into roughly equal parcels for the benefit of his respective family units. In each case the devised parcels were described by their metes and bounds. Anticipating that his partition might not be acceptable to all, he also inserted a clause in the will which stated:

> If at any time any should attempt or should proceed in changing or breaking my aforesaid will, then it is my wish and desire that the half interest that I hold and possess in all my estate, both real and personal, be given and I hereby bequeath the same to my present wife for the benefit of my sons Oscar D. and Lewis Perry, sons of my present wife by me.[12]

The children by his first marriage did contest his disposition, and the court duly applied the *in terrorem* clause to effect a forfeiture in favor of the children by his fourth marriage.[13]

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[11] 52 Tex. Civ. App. 594, 114 S.W. 897 (Ct. Civ. App. 1908).

[12] *Id.* at 595, 114 S.W. at 899.

[13] The fact that the *in terrorem* clause had to be applied by the court means that it was ineffective in its purpose of avoiding dispute. As will be noted subsequently the anatomy of the *in terrorem* clause can only be seen in cases which attest to its failures.

Litigation over an estate disposition is undesirable. The very existence of litigation means that the estate plan has failed in its objective of assuring the orderly transmission of property. Moreover, the cost of a lawsuit may deplete an estate, while delay resulting from legal dispute can cause considerable hardship to its beneficiaries. Not only will the estate be subject to expenses for attorney's fees and court costs; but the collateral effects of litigation may be disastrous, for example, where the lawsuit results in reducing the share of an estate which qualifies for the federal estate tax marital deduction.[14] Another undesirable consequence of litigation may be that it will bring to public attention matters which a testator or estate beneficiaries would prefer to keep private. Such a desire to avoid publicity is seen in *In re Simson's Estate*,[15] where a decedent left his widow the sum of ten thousand dollars, while providing that the bulk of his estate should be given to a Miss Barry Brady. This estate disposition would inevitably invite public comment, and apprehension of such publicity may have motivated the testator to include an *in terrorem* provision in his will.

While litigation may have serious consequences to an estate plan, there are many desirable estate dispositions which invite dispute, especially in the proper domestic context. Thus, *Perry v. Rogers*,[16] which has previously been cited as a classic application of the *in terrorem* clause, presented domestic factors, resulting from the testator's four marriages and eleven children, which provided the elements for internecine litigation. Other domestic re-arrangements may equally create fertile ground for

[14] See Case v. Roebling, 42 N.J. Super. 545, 127 A.2d 409 (Ch. Div. 1956) in which the court noted that the interpretation of a will sought by one set of contesting estate beneficiaries would cause the imposition of $1,462,301.55 in additional taxes by reducing the marital deduction allowed to the estate.

[15] 123 N.J. Eq. 388, 196 Atl. 451 (Prerog. 1938). Apparently the testator believed that the bequest which he provided for his widow, when coupled with an *in terrorem* clause providing for its forfeiture to Miss Brady in the event that his will was contested, might avoid publicity concerning his estate disposition. Unfortunately, his son, a non-beneficiary, filed a *caveat* against the probate of his will, which *caveat* was dropped after a compromise was arranged with Miss Brady. So far his disposition had caused no significant publicity. However, the whole transaction was brought into court in order to determine whether the $10,000 bequest passed from the testator to his widow and was subject to the lower transfer inheritance tax rate applicable to transfers between spouses or whether a forfeiture had been effected, so that the $10,000 passed to Miss Brady, who was not related to the decedent. Thus, the best prepared plans can go astray. As has previously been noted, the *in terrorem* clause can only be seen in its failures.

[16] *Supra* note 11.

contesting an estate disposition. Today, in deference to the federal estate tax marital deduction,[17] it is common for an estate plan to give a testator's widow a general power of appointment over one-half of his adjusted gross estate. Where a testator has been married previously and where his children are the issue of his prior marriage or marriages, it is easy to recognize that relations may be strained between such children and his current spouse. In this setting, an estate plan which attempts to take maximum advantage of the estate tax marital deduction may be regarded by the children as a diversion of their patrimony. A lawsuit which may reduce the marital gift can cost them nothing, since they are unlikely to be the beneficiaries under the general power of appointment held by their step-mother. With nothing to lose and the possibility to gain at the expense of their supposed family interloper, the stage is set for litigation. Unfortunately, such a lawsuit may wreak havoc to an estate plan.

In view of the threat which potential litigation poses to the effective achievement of an estate plan, it might be assumed that the *in terrorem* clause would occupy a significant place in the law and lore of estate planning. On the contrary, the *in terrorem* clause occupies only a very minor role in contemporary estate planning.

The *in terrorem* clause is not a recent innovation of the common law; the application of the clause to avoid will contests has been traced in England back to the seventeenth century.[18] The clause has also received long standing recognition under American law,[19] although one state, Indiana, has a statutory prohibition which voids an *in terrorem* provision purporting to work a forfeiture for contesting a will or seeking to prevent its admission to probate.[20]

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[17] Int. Rev. Code of 1954, § 2056.

[18] Powell v. Morgan, 2 Vern. 90, 23 E.R. 668 (Ch. 1688).

[19] The earliest American case found enforcing a forfeiture for contesting an estate disposition is Breithaupt v. Bauskett, 1 Rich. Eq. 465 (S.C. 1845). In this case a testator had given his mistress and illegitimate children a greater share of his estate than allowed by law. He provided that any devisee who should disturb or interfere with this arrangement should forfeit all rights under his will. The provision was upheld, but the association is hardly auspicious. Compare, Unger v. Lowey, 202 App. Div. 213, 195 N.Y. Supp. 582 (1922), *rev'd on other grounds*, 236 N.Y. 73, 140 N.E. 201 (1923).

[20] Ind. Ann. Stats. 6-602 (Burns 1953). Apparently this statutory prohibition does not completely eliminate the application of the *in terrorem* principle in

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While the clause has been generally recognized, there are relatively few decisions involving its application.[21] Professor Olin L. Browder, Jr., who examined this area of the law in 1938, observed that American courts have given only limited treatment to the clause,[22] and he noted further that more than two-thirds of these decisions had been rendered since 1900.[23] It is not surprising to find that there are few judicial decisions involving the *in terrorem* clause, since its purpose is to prevent litigation. Court decisions involving the clause are necessarily instances where the clause has been ineffective. Thus, one might conclude that the absence of reported cases involving the *in terrorem* clause is mute testimony to its general effectiveness. At least it is logical to conclude that case decisions are an inadequate gauge with which to test the clause.

If the absence of judicial decisions involving the *in terrorem* clause is evidence of its potency, it might be supposed that the clause would receive extensive recognition among commentators on estate planning. However, such an assumption is not borne out by the evidence. Those who are concerned with estate planning give little recognition to the *in terrorem* clause. For example, the latest edition of *Page on Wills,* published in 1962, devotes a scant seven pages to the *in terrorem* clause as a condition against contest of a will, and these pages are more than half occupied by footnotes.[24] Almost as much text space is devoted to the legal status of a murderer as devisee and heir of his victim.[25]

Similarly, other authorities give little serious consideration

(Footnote continued from preceding page)
Indiana. See, Doyle v. Paul, 119 Ind. App. 632, 86 N.E.2d 98 (1949), *rehearing denied,* 119 Ind. App. 632, 87 N.E.2d 885 (1949).

[21] Reported decisions involving the *in terrorem* clause will generally be found digested under *Wills,* key number 665 in the West digest system. One can easily become familiar with all reported decisions in the respective decennial digests.

[22] Browder, *Testamentary Conditions Against Contest,* 36 Mich. L. Rev. 1066 (1938).

[23] *Ibid.* One contemporary commentator states that lawyers are requested to insert "no contest" clauses in wills with more frequency today than in the past. Kertz, *Contesting a Will in the Face of a Forfeiture Clause,* 45 Geo. L.J. 200 (1956-57). Perhaps some circumstantial evidence is available to support this statement. *E.g.,* Nichols, Cyclopedia of Legal Forms, *supra* note 2, now contains more than twice the textual material and forms on the subject than its predecessor volume. 9 Nichols, Cyclopedia of Legal Forms § 9.1273 (1936).

[24] 5 Bowie-Parker, Page on Wills § 44.29 (1962). An additional three-quarters of a page is devoted to the clause as prohibiting claims against a testator's estate. *Id.* § 44.24.

[25] *Id.* §§ 17.19, 17.20.

to the *in terrorem* clause other than to acknowledge its existence.[26] Perhaps the most complete examination of the subject in treatise form is found in part 27 of the *American Law of Property,* which is devoted to illegal conditions and limitations as applied to property interests.[27]

Considering the treatment which the *in terrorem* clause has received at the hands of legal scholars, one might conclude that the clause is deemed an illegitimate child of the common law, whose existence must be recognized but which need not be promoted in polite legal society. For reasons which will be considered further it is submitted that this analogy is fitting.

Once it is seen that the *in terrorem* clause has been relegated to the legal demimonde in spite of its apparent usefulness, it is appropriate to examine some of the reasons for its disrepute. Such an examination may lead to a proper evaluation of the significance of the clause.

The present low estate of the *in terrorem* clause is partially a result of guilt by association. It has already been noted that the *in terrorem* clause as applied to will contests is only one aspect of the general subject of conditional testamentary gifts.[28] Conditional gifts are not favored by the law, and whenever possible testamentary language will be interpreted to create absolute rather than conditional bequests.[29] Similarly, the clause attempts to invoke a forfeiture, and it is hardly necessary to repeat the legal truism that forfeitures are not favored by the law and provisions in a will causing a forfeiture will be strictly construed.[30] Moreover, the *in terrorem* principle is often associated with attempts to establish illegal conditions or as an inducement to

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[26] See *e.g.,* Atkinson, Wills 408-10, 412-13, 813 (2d ed. 1953) (almost the same amount of text is allocated to inheritance by murderers from their victims. *Id.* at 153-56); 96 C.J.S. *Wills* § 983 (1957) (more space is devoted to the capacity of murderers and the like to inherit from their victims. *Id.* § 104); Casner, Estate Planning (3d ed. 1961) (Professor Casner dismisses the clause with only a footnote among the 1,750 pages of his treatise. *Id.* vol. I. 53 n. 11. However, it should be noted that the 1963 supplement to the treatise more than doubles the textual space allocated to the clause. *Id.* 1963 Suppl. 11 n. 11.).

[27] 6 American Law of Property §§ 27.3-27.11 (1952). This part was written by Professor Olin L. Browder, Jr., whose investigations of the *in terrorem* clause have been cited previously. See note 22 *supra.* For other research by this scholar see Browder, *Testamentary Conditions Against Contest Re-Examined,* 49 Colum. L. Rev. 320 (1949).

[28] See cases cited note 3 *supra.*

[29] See *e.g.,* Kibbe v. City of Rochester, 57 F.2d 542 (D.C. W.D. N.Y. 1932).

[30] See, *e.g.,* Saier v. Saier, 366 Mich. 515, 115 N.W.2d 279 (1962).

conduct in violation of established public policy.[31] Where the *in terrorem* principle appears to impinge on public policy, courts have sometimes avoided the true policy questions involved by deciding that the clause was intended only to terrorize and not to work any actual forfeiture.[32]

However, if all that marred the *in terrorem* escutcheon was its association with illegal attempts to invoke the *in terrorem* principle, its tarnished reputation could be brightened by referring to the clause as a condition against will contest or by similar designations which contemporary commentators on the subject seem to favor.[33] It is, however, submitted that the clause is regarded with apprehension for reasons which run deeper than its dishonorable associations.

Another factor tending to discredit the *in terrorem* clause is its treatment by the courts. As previously observed in this article, the clause has received only limited judicial consideration, and even such scant recognition has been inconsistent.[34] It is true that the few reported decisions concerning the clause raise unresolved questions. However, reported decisions often involve poorly drafted clauses. Thus, for example, a court is compelled to devine a testator's intention in order to determine what conduct constitutes a violation of a clause providing a forfeiture in the event that anyone is "dissatisfied"[35] with a will or in the event that there is any "disputing"[36] a will. Even if the clause is clearly drafted, there may be a serious question as to its intended scope.[37] It has been held that merely filing a caveat against the probate of a will does not constitute a contest,[38] although a contrary result has also been reached.[39] It is generally held that a

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[31] See, *e.g.*, Girard Trust Co. v. Schmitz, 129 N.J. Eq. 444, 20 A.2d 21 (Ch. 1941), in which the court refused to enforce a provision in a testator's will providing for a forfeiture in the event that certain brothers and sisters of the testator were to communicate or live under the "same roof" with each other.

[32] *E.g.*, Wells v. Menn, 158 Fla. 228, 28 So. 2d 881 (1946); *In re* McArdle's Will, 147 Misc. 876, 264 N.Y. Supp. 764 (Surr. Ct. 1933) (clause only intended to terrorize in absence of gift over in the event of contest).

[33] See, *e.g.*, Browder, *Testamentary Conditions Against Contest, supra* note 22.

[34] *Ibid.*

[35] *In re* Hickman's Estate, 308 Pa. 230, 162 Atl. 168 (1932).

[36] Smithsonian Institution v. Meech, *supra* note 3.

[37] Annot. *What constitutes contest or attempt to defeat will within provision thereof forfeiting share of contesting beneficiary,* 49 A.L.R.2d 198 (1956).

[38] *E.g.*, Wells v. Menn, *supra* note 32.

[39] Cross v. French, 118 N.J. Eq. 85, 177 Atl. 456 (Ch. 1935).

suit for construction of a will containing an *in terrorem* clause is not a contest.[40]

Undoubtedly the greatest area of legal doubt concerns the extent to which forfeiture will be enforced where the contestant had "probable cause" to bring the contest, even though such action was unsuccessful. It has previously been seen that a testator is free to condition his bounty upon his beneficiaries' acquiescing in his estate disposition. Thus, public policy is not concerned with a testator's initial choice to incorporate an *in terrorem* provision in his will, and favors enforcing testamentary dispositions in accordance with a testator's wishes. However, sound public policy also requires that estate dispositions be in accordance with the law, and this policy may be defeated where an *in terrorem* clause terrorizes into silence beneficiaries who have probable cause to raise a legal contest.[41] As a result of this conflict of policies, there is disagreement among American courts whether a forfeiture should result under an *in terrorem* clause where there was probable cause for contest.[42] The American Law Institute attempts to reconcile this conflict of policies by declaring that the existence of probable cause will not avoid a forfeiture under an *in terrorem* clause where the contest was brought on the "typical" grounds of fraud, lack of testamentary capacity or undue influence; conversely, where the contesting party had probable cause to believe that there had been a subsequent revocation of the contested will or that it constituted forgery, there will be no forfeiture.[43]

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[40] *E.g.*, Dravo v. Liberty Nat. Bank & Trust Co., 267 S.W.2d 95 (Ky. 1954). *But see*, Federal Trust Co. v. Ost, 120 N.J. Eq. 43, 64, 183 Atl. 830, 840 (Ch. 1936), where one court warned a litigant that she had come "perilously near" to violating an *in terrorem* clause by arguing for a construction of a will which would have resulted in an intestacy under which she would receive more than the share given to her by the will.

[41] For considerations of the public policy questions raised where a contestant has probable cause see, South Norwalk Trust Co. v. St. John, *supra* note 3; Comment, *No-Contest Will Clauses*, 24 U. Chi. L. Rev. 762 (1957).

[42] For decisions imposing a forfeiture without regard to the existence of probable cause see, *e.g.*, *In re* Kitchen, *supra* note 8; Rudd v. Searles, 262 Mass. 490, 160 N.E. 882 (1928). For decisions holding that the clause will not be enforced where a contest was brought for probable cause see, *e.g.*, Ryan v. Wachovia Bank & Trust Co., 235 N.C. 585, 70 S.E.2d 853 (1952); *In re* Keenan's Will, 188 Wis. 163, 205 N.W. 1001 (1925). In England a forfeiture is not imposed where the contestant had good cause for the contest. Powell v. Morgan, supra note 18; see also *In re* Williams, [1912] 1 Ch. 399.

[43] Restatement, Property § 428 (1944); see also *id.* § 429 for provisions concerning forfeitures where contest involves judicial or statutory limitations on the devolution of property.

In addition to questions raised by existing court decisions, there are other forseeable problems which may be created by including an *in terrorem* clause in an estate plan. These problems transcend the question of forfeiture and the immediate beneficiaries of the plan. An example of such a problem is the impact of an *in terrorem* clause on the qualification of assets for the federal estate tax marital deduction. Under Treasury Regulations, property acquired by a surviving spouse as a result of a controversy involving a decedent's estate will be regarded as having "passed from the decedent to his surviving spouse" only if the assignment or surrender of such property was a bona fide recognition of enforceable rights of the surviving spouse.[44] How would these regulations be applied if a will contest were initiated by a testator's children involving a will which provided for a forfeiture in favor of his surviving spouse in the event of such a contest, and the contest were later settled privately by consent? To what extent might the Commissioner open up the question of probable cause if the local law of the testator's domicile would not enforce a forfeiture where probable cause existed for the contest? Conversely, if it suited his purposes, might not the Commissioner contend that upon instituting the contest the whole estate had been forfeited to the surviving spouse and that any property thereafter acquired by the contestants was received from the spouse rather than the decedent?[45] This article has previously cited a New Jersey decision in which the court permitted the State Tax Commissioner to make such a collateral investigation in order to establish that the institution of a will contest by a non-beneficiary caused a forfeiture of a bequest originally given to the decedent's widow.[46]

But, concern that courts are inconsistent in their application of the *in terrorem* clause or that a violation of the clause may create collateral problems is no reason for discounting the clause itself. The purpose of an *in terrorem* clause is prophylactic not

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[44] Tres. Reg. § 20.2056(e)-2(d)(2) (1958).

[45] Such a contention might be advantageous for the Commissioner where the surviving spouse died shortly after the testator in order to cause inclusion of such property in the spouse's estate as a transfer in contemplation of death. Int. Rev. Code of 1954, § 2035. Such a rationale could also be employed to support the imposition of a gift tax. See, Housman v. Comm'r, 105 F.2d 973 (2d Cir. 1939), *affirming* 38 B.T.A. 1007 (1938), *cert. denied*, 309 U.S. 565 (1940).

[46] *In re* Simson's Estate, *supra* note 15.

curative. It is intended to avoid litigation, and not to remedy the damage which litigation causes. In those cases where a contest arises in spite of the existence of an *in terrorem* provision, the clause has failed to fulfill its function, and it may matter little that the clause is inconsistently applied, at least for the estate involved.

It is submitted that the true reason for the *in terrorem* clause's disrepute lies in its very essence. The clause is intended to negate the judicial process by terrorizing into submission those who might otherwise seek assistance from the courts. It is a jurisprudential antichrist. Moreover, it is an antichrist which requires the aid of the church in propagating its heresy. The clause demands that the judicial system, which it seeks to avoid, penalize the person who invokes the very procedures which the system provides. If the *in terrorem* principle were allowed to occupy a significant place in law, it would threaten the existence of its very creator. The law cannot allow its own Frankenstein monster to run at large, and thus the *in terrorem* clause is strictly confined.

In somewhat analogous situations involving the right of free contract, courts have struggled with the question of the extent to which the law will enforce bargains which are designed to remove a contract from the judicial system whose aid is sought. Judicial decisions involving this question have, as might be expected, been inconsistent, just as judicial decisions involving the *in terrorem* clause have been inconsistent.[47]

While the *in terrorem* principle must play a restrained role in the legal system, the *in terrorem* clause is sanctioned in the estate planning field. Because of its very negative aspect, it is extremely difficult to evaluate its effectiveness even in this circumscribed area. The relatively few decisions which are found dealing with the clause are all cases involving the failure of the clause. They attest to the ambiguous draftsmanship of a

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[47] See, *e.g.*, Smith v. McDonald, 37 Cal. App. 503, 174 Pac. 80 (Dist. Ct. App. 1918) (enforcing agreement that contract should become void if a party commenced legal action); James v. Vernon's Pools [1938] 2 All Eng. L. Rev. 626 (K.B.) (upholding express provision in contract against legal enforcement of bargain). But see *contra*, Farmer's Bank v. Bass, 218 Ky. 813, 292 S.W. 489 (1927) (refusing to enforce contract provision which would cut off right to appeal court decision); Pope Mfg. Co. v. Gormully, 144 U.S. 224 (1892) (disregarding terms which prohibited party from raising legal objections to agreement.).

particular clause or the temerity of a beneficiary. It is impossible to assess the value of the *in terrorem* clause where it has been effective, because such situations necessarily have not come within the purview of the judicial system. The value of the clause is not subject to scientific proof. It is also submitted that its negative essence and the fact that the effectiveness of the *in terrorem* clause may not be demonstrated by scientific proof causes an emotional rejection of the clause among treatise writers and others who are steeped in the traditional legal system.

However, one should not need scientific proof to conclude that the possibility of forfeiture may be a strong deterrent to litigation. The very inconsistency in judicial application of the *in terrorem* clause can be an important factor in inducing potential litigants to compromise their differences. Indeed, it would be a rash counselor who would not advise moderation to his client when confronted with a well drafted clause designed to avoid the very contest which is contemplated.

The purpose of this article has been to focus attention on the *in terrorem* clause. The *in terrorem* clause is admittedly a highly specialized tool, but there are situations where the threat of litigation may necessitate employing the most specialized techniques in order to prepare an estate plan which will avoid the disasters of forseeable litigation. Where such a situation exists, it is suggested that those who plan estates should not, themselves, fear the *in terrorem* clause.