

# IN TERROREM CLAUSES



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## WHAT ARE IN TERROREM CLAUSES?

In *in terrorem* clauses—sometimes known as no contest or forfeiture clauses—seek to prevent contest of a will or trust instrument by removing the beneficiary who challenges the provisions of the applicable instrument. If the beneficiary is removed, more often than not, his or her descendants also lose any beneficial interest to which they would otherwise have been entitled.

Beneficiaries are motivated to challenge a will or trust instrument because they stand to gain economically if successful in the challenge. A successful challenge to the validity of a document will cause the decedent's estate or trust to pass intestate or pursuant to an earlier document that was not contested (or was not contested successfully). In some instances, a beneficiary may challenge the validity of only a portion of a document. If the beneficiary is successful, only that provision is eliminated, and the remainder of the will or trust instrument continues in effect. This approach, where allowed under applicable state law, can be beneficial if, for example, there are large pre-residuary gifts to individuals and all or a portion of the remainder is to pass to the challenger. Under these circumstances, the

challenger may have more to gain by challenging only the pre-residuary gifts. The pre-residuary gifts would be eliminated, the residue would become larger, and the challenger would receive more than he or she otherwise would have received without the challenge.

By using an *in terrorem* clause, testators and settlors seek to discourage beneficiaries from bringing these types of challenges. If, however, a testator or settlor has completely removed a child or other individual whom the testator or settlor believes would challenge the will or trust instrument, an *in terrorem* clause will not serve its purpose. In such a case, that child or other individual has nothing to lose by bringing a challenge. The use of *in terrorem* clauses is effective only when there is a sizeable enough gift to make the target beneficiary think twice about a challenge.

*In terrorem* clauses serve many purposes: (i) preventing costly litigation which would diminish the size of the affected estate or trust; (ii) preventing frivolous lawsuits which are a usurpation of court resources and time; and (iii) preventing private family information from being exposed to public view and scrutiny.

While preserving privacy is almost always a concern for estate planning clients, privacy carries special significance in the context of trust contests. Clients are attracted to revocable trusts because, when properly funded, a public probate proceeding can be avoided. As a result, the decedent is able to protect from broad disclosure details regarding his or her assets as well as the identity of the beneficiaries. This privacy screen is removed when family members and other beneficiaries litigate provisions of a trust instrument. Family life is then aired in the very public setting of the courtroom, which may reveal family secrets the decedent may have otherwise desired remain private.<sup>1</sup> Consequently, a settlor may add privacy protection through the use of an in terrorem clause by discouraging beneficiaries from bringing these buried secrets into a public and unforgiving light.

On the other hand, the use and enforcement of in terrorem clauses present serious issues in connection with arriving at a just result regarding the disposition of property under a will or trust instrument. In many states, courts seek to balance a desire to honor the testator's or settlor's wishes against public policy. These courts are particularly concerned about preventing suits that would reveal to the court that a will or trust instrument was in truth and in fact executed outside the bounds of the law.<sup>2</sup> In these states, courts will not enforce in terrorem clauses against beneficiaries who have a legitimate basis (probable cause) for challenging the validity of a will or trust instrument. The view in these states is that it is the court's duty to ensure that wills and trust instruments comply with the law, and courts can do this only when interested parties are able without fear to raise issues of validity.

### **TYPES OF IN TERRORM CLAUSES**

While the goal of all in terrorem clauses is to dissuade those who would challenge the will or trust instrument, there are different types of challenges that might be targeted by a given type of in terrorem clause.

### **To Discourage a Challenge Regarding Validity of a Document**

Clauses relating to validity often encompass challenges to the document as a whole as well as challenges to specific provisions therein. The following is an example:

If any devisee or beneficiary under my will or under any trust established under my will shall in any way, directly or indirectly, initiate or participate in any contest, challenge, or attack to the validity of my will or any of its provisions, or object to or contest its admission to probate, or conspire with or give aid to any person doing or attempting any of the foregoing, then in each case all provisions for such beneficiary and his or her descendants herein shall be void and my estate shall be disposed of in the same manner provided herein as if such person had predeceased me leaving no descendants surviving me.<sup>3</sup>

A similar clause may also read:

Should any beneficiary hereunder, or anyone duly authorized to act for such beneficiary, institute or direct, or assist in the institution or prosecution of, any action or proceeding of any kind in any court, at any time, for the purpose of modifying, varying, setting aside or nullifying any provision hereof relating to my Louisiana estate on any ground whatsoever, all interest of such beneficiary, and the issue of such beneficiary, to my Louisiana estate shall cease, and the interest of such beneficiary, and such beneficiary's issue, in and to my Louisiana estate shall be paid, assigned, transferred, conveyed, and delivered to, or for the benefit of, those persons would take such beneficiary's interest in my Louisiana estate if such beneficiary died intestate, unmarried, and without issue on the date of the institution of the above described action or proceeding.<sup>4</sup>

These two clauses, while similar, may lead to significantly different outcomes in judicial interpretation. Assume for the purposes of comparison that

the testator owns real property in Louisiana and Kentucky. Also assume that one of the testator's children files a suit challenging the validity of a testamentary provision relating to the disposition of the Kentucky real estate. One can see how the two clauses may yield different results. The first clause is more general, addressing "any contest, challenge, or attack to the validity" of the will or any of its provisions. A challenge to a provision disposing of the Kentucky real estate falls within the scope of the first clause. The challenge, however, would fall outside the scope of the second clause because, by its express terms, the second clause relates only to the "Louisiana estate."

### **To Discourage a Challenge to Acts or Omissions of Fiduciaries**

Many clients are concerned that, while the beneficiaries may not disagree with the dispositive terms of the will or trust instrument, the beneficiaries may develop a confrontational attitude toward the fiduciaries chosen by the client. Consequently, such clients sometimes insert clauses similar to the ones outlined above but revise the language to state that, if any beneficiary should challenge or attack the actions of an executor or trustee, such beneficiary and his or her descendants shall forfeit their share of the estate or trust, as the case may be.

This type of in terrorem clause is sometimes said to be a variety of exculpation clauses and held to standards governing those clauses.<sup>5</sup> Note, however, that an in terrorem clause of this type is fundamentally different from an exculpation clause in that, with an exculpation clause, there is no possibility that a beneficiary who challenges a fiduciary's acts or omissions will be removed as a beneficiary if the court finds the challenge not to be justified.

### **Other Types**

The exact language used in in terrorem clauses can vary depending on the needs and concerns of the client. Such language can be broad, as in the examples above, or they can be narrow. For example, the clause may be triggered only by actions contesting the "distribution percentages or [distribution]

procedures."<sup>6</sup> As an example, a challenge to the appointment of a particular individual as executor is unlikely to trigger this type of clause. By contrast, a broader clause providing for forfeiture in the event there is a contest regarding the provisions of the will would almost surely be triggered by such a challenge. This is because a provision of the will appoints the executor.

## **DEVELOPMENTAL HISTORY**

In terrorem clauses have been around in some form since Babylonian times.<sup>7</sup> They began not as threats to disinherit beneficiaries under wills but more generally as ways to encourage certain behavior. As many as 4,000 years ago, in terrorem clauses were placed most commonly in marriage contracts to encourage parties to adhere to the terms of the marriage.<sup>8</sup> Failure to abide by the terms of the contract often resulted in monetary penalties or physical punishment.<sup>9</sup> For example, the husband was sometimes required to pay a fine if he abandoned his wife, or the wife might have been physically abused for denying her husband.<sup>10</sup> These conditions in marriage contracts were met with disfavor by English courts and subsequently held invalid unless there was a gift over following the expected inheritance of the spouse.<sup>11</sup>

As time progressed, in terrorem clauses became increasingly popular in wills in England. The "terror" provisions reflected the era in which they were drafted. In the tenth century, these clauses threatened divine punishment if a devisee challenged the legacy left by the testator.<sup>12</sup> In terrorem clauses were also used to force others to act or refrain from acting following the testator's death. The testator would direct certain individuals to serve as executor of the estate or to permit a family member to live in the decedent's home following his or her death.<sup>13</sup>

The use of in terrorem clauses slowed after devises of real property by will were extinguished with the introduction of the feudal system.<sup>14</sup> Landowners would instead convey the land to trustees. The landowners would then use their wills as means to ask the trustees to convey the land to family members

or willing buyers.<sup>15</sup> It was not until the enactment of the Statute of Wills in 1540 that in terrorem clauses resurfaced in testamentary documents.<sup>16</sup>

A transition away from religious threat occurred as society became more materialistic and less concerned about the afterlife.<sup>17</sup> Instead, testators' disincentive for contest became disinheritance, likely as a form of more immediate punishment than religious damnation.<sup>18</sup> English courts were ruling on the validity and enforceability of in terrorem clauses containing monetary forfeiture as early as the 1700s.<sup>19</sup> In general, English courts enforced in terrorem provisions devising real property irrespective of whether such provisions provided for the disposition of property in the event of forfeiture.<sup>20</sup> In contrast, clauses suggesting forfeiture of personal property were viewed as "empty threat[s]" without an alternative distribution of the property.<sup>21</sup> As such, devises of personal property were enforced only if the provision provided for a gift over.<sup>22</sup>

American courts rejected the English divergence in treatment between real and personal property in the mid-nineteenth century. The Ohio Supreme Court ruled that the testator's wishes should be followed with respect to any property devise whether real or personal.<sup>23</sup> The Supreme Court of the United States also upheld the validity of in terrorem clauses absent a distinction between real and personal property lamenting that private life is brought public without the testator alive to explain, resulting in disposition of property contrary to the testator's wishes.<sup>24</sup>

Although American jurisprudence has evolved in various directions since the late nineteenth century with some states enforcing in terrorem clauses wholesale and others refusing to enforce them at all, in terrorem clauses remain widely enforceable in the United States with regard to both real and personal property.

## **ENFORCEABILITY IN THE UNITED STATES**

Many states have adopted statutes directly addressing the enforceability of in terrorem clauses, while

others have addressed these types of provisions through case law.

Florida is the only state that has declared in terrorem clauses void.<sup>25</sup> All the remaining states will enforce in terrorem clauses at least to some degree. Enforcement of in terrorem clauses in many states is limited to contests brought without probable cause and/or in good faith. Furthermore, in terrorem clauses are strictly construed in many states, while others simply look to the plain language of the clause to determine whether the action at issue triggers the clause.

Though historically more prevalent in wills, in terrorem clauses are increasingly finding their way into trust instruments. The interpretation and enforceability of in terrorem clauses in trust instruments is much less settled than in cases involving wills. Today, the laws of many states directly address the use of in terrorem clauses in trust instruments. Other states implicitly address these clauses through their statutes providing that the same rules of construction that apply to the interpretation of wills apply to trust instruments as well. The discussion below outlines the interpretation and enforceability of in terrorem clauses in each state with regard to both wills and trust instruments.

### **Restatement (Third) of the Law of Property**

The Restatement (Third) of the Law of Property provides that "[a] provision in a donative document purporting to rescind a donative transfer to, or a fiduciary appointment of, any person who institutes a proceeding challenging the validity of all or part of the donative document is enforceable unless probable cause existed for instituting the proceeding."<sup>26</sup>

Comment c notes that:

Probable cause exists when, at the time of instituting the proceeding, there was evidence that would lead a reasonable person, properly informed and advised, to conclude that there was a substantial likelihood that the challenge would be successful. A factor that bears on the existence of probable cause is whether the beneficiary relied upon the advice of independent

legal counsel sought in good faith after a full disclosure of the facts.<sup>27</sup>

The rules and rationale regarding in terrorem clauses are the same for wills and trust instruments because they serve the same purpose.<sup>28</sup> As mentioned above and discussed in more detail in the state-by-state analysis below, several states have not addressed whether in terrorem clauses are enforceable in trust instruments. Furthermore, some states will enforce clauses in both wills and trust instruments but apply different standards to each. Alaska, for example, acknowledges a probable cause exception in connection with the enforcement of in terrorem clauses found in wills but enforces in terrorem clauses in trust instruments irrespective of probable cause.<sup>29</sup>

### Uniform Probate Code

Uniform Probate Code (UPC) § 2-517 states that “[a] provision in a will purporting to penalize an interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings.” A majority of states have either adopted a statute identical or similar to UPC § 2-517 recognizing the probable cause exception or apply a similar rule through case law.

## STATE SPECIFIC RULES

### Alabama

In terrorem provisions in wills and trust instruments are enforceable in Alabama, though strictly construed.<sup>30</sup> *Harrison v. Morrow* involved an in terrorem clause that provided for forfeiture for challenges “regarding distribution percentages or [distribution] procedures” in the will.<sup>31</sup> The court explained that a challenge to a *distribution* of property under the will is a challenge to the act of the executor, whereas a challenge to the *disposition* of property under the will is a challenge to the testator’s wishes.<sup>32</sup> The devisees’ challenge in *Harrison* alleging forgery went to the validity of the will. Therefore, the challenge was not against the distribution of property as would cause a forfeiture but to the disposition of

the property and outside the scope of the in terrorem clause.<sup>33</sup>

### Alaska

Alaska permits the use of in terrorem clauses in wills and trust instruments, but to different extents. Such clauses in wills are enforceable unless probable cause exists for bringing the action.<sup>34</sup> However, in terrorem clauses in trusts will be enforced irrespective of probable cause.<sup>35</sup>

### Arizona

In terrorem clauses are enforceable in wills in Arizona, but only in the absence of probable cause.<sup>36</sup> Acknowledging that this statute only applies to wills, the Arizona Court of Appeals has followed the Restatement (Second) of the Law of Property and applied this rule to trusts as well.<sup>37</sup> To avoid enforcement of an in terrorem clause, probable cause is required only to support each legal claim, not to support each factual allegation.<sup>38</sup> In *Matter of ABB Trust*,<sup>39</sup> the Arizona Court of Appeals determined the claimants had made out a claim that the settlor, while under undue influence, had persuaded the trust protector to add an in terrorem provision. *Taylor, et al. v. Credille*, an unreported 2018 memorandum decision of the Arizona Court of Appeals, held that a counterclaim seeking modification and reformation of a trust instrument violated an in terrorem provision.

### Arkansas

In terrorem clauses are enforceable in Arkansas, which does not allow for a good-faith exception in direct will contests.<sup>40</sup> However, the good-faith exception does apply in the specific circumstance of a litigant who offers a second will for probate claiming it to be the decedent’s most current will.<sup>41</sup> The enforceability of in terrorem clauses in trust instruments in Arkansas depends on the facts and circumstances of a given case.<sup>42</sup>

## California

California has detailed guidelines regarding the enforceability of in terrorem clauses in wills and trust instruments (for trusts that became irrevocable on or after January 1, 2001). In terrorem clauses are enforceable against direct contests brought without probable cause.<sup>43</sup> A direct contest is one that contests validity of an instrument based on forgery; lack of due execution; lack of capacity; menace, duress, fraud, or undue influence; revocation of a will or trust instrument; or disqualification of a beneficiary.<sup>44</sup>

In terrorem clauses are also enforceable against challenges to the transfer of property on the grounds that the transferor did not own the property, against creditor's claims, or against prosecution of action based on a creditor's claim.<sup>45</sup> However, clauses are only enforceable against these actions to the extent the in terrorem clause specifically provides for these types of challenges.

In *Neyama v. Sugishita*,<sup>46</sup> not only was a beneficiary's litigation to cancel two trust amendments ineffectual because the time under California law to contest a trust was time-barred in any event, but the useless effort also triggered in terrorem clauses.

## Colorado

In terrorem clauses are enforceable in wills unless probable cause exists to bring the action.<sup>47</sup> However, case law suggests that good faith plays a factor in determining whether probable cause exists.<sup>48</sup> In terrorem clauses are presumably also enforceable in trust instruments.<sup>49</sup> Assuming such a clause is enforceable in a trust, the Colorado Supreme Court held that these terms only prohibited a challenge to the trust, so the clause was not enforceable against the decedent's daughter who contested the will.<sup>50</sup>

## Connecticut

Connecticut enforces in terrorem clauses in wills absent good faith and probable cause for the action.<sup>51</sup> Such clauses are disfavored by courts and strictly construed against forfeiture.<sup>52</sup> An in terrorem clause is valid in both wills and trusts if it is

"certain, lawful, and not opposed to public policy."<sup>53</sup> In *Salce v. Cardello*, the court held that a broadly-worded in terrorem clause that "punishes the beneficiaries ... from objecting to any actions of the trustee, including nondiscretionary, ministerial acts" was unenforceable because it violated public policy and "would significantly limit valuable judicial oversight of the fiduciary's actions."<sup>54</sup> The court explicitly declined to reach the issue of whether the probable cause exception applied to in terrorem clauses in trust agreements.<sup>55</sup>

## Delaware

Delaware will enforce in terrorem clauses in wills and trust instruments, but specific actions are excluded from their applicability.<sup>56</sup> Clauses will not be enforced in: (i) actions brought by a trustee of a trust or personal representative under a will; (ii) actions where a beneficiary prevails "substantially"; (iii) agreements among beneficiaries in settlement of a dispute relating to a will or a trust; (iv) actions to determine if a proposed or pending proceeding would constitute a contest that will trigger the in terrorem clause; and (v) suits to interpret a will or trust brought by a beneficiary.<sup>57</sup>

## District of Columbia

The District of Columbia will enforce in terrorem clauses in wills and trust instruments even if good faith or probable cause exists.<sup>58</sup> A testator's wishes should not be set aside "in the interest of greater freedom of litigation."<sup>59</sup>

## Florida

In Florida, in terrorem clauses in wills and trust instruments that became irrevocable after October 1, 1993 are per se unenforceable.<sup>60</sup> This does not prevent testators from including clauses in wills or trust instruments that provide an alternative to a statutory right.<sup>61</sup> In *Dinkins v. Dinkins*, a widow brought a declaratory judgment action seeking a determination that a provision in her late husband's trust agreement was an invalid penalty clause under Florida law.<sup>62</sup> The clause permitted the widow to disclaim her interest in the QTIP trust created under the

husband's trust agreement and waive her right to elective share in exchange for a \$5 million outright distribution.<sup>63</sup> This clause was not a penalty clause because the widow did not have to forfeit her statutory right to contest the instrument.<sup>64</sup> Rather, the widow had a choice between the statutory benefit and the \$5 million distribution. Under such a clause, "the beneficiary has the ability to choose an option at least as valuable as the statutory minimum."<sup>65</sup> As such, the clause was fully enforceable against the widow.

### Georgia

Georgia enforces in terrorem clauses so long as there is direction in the will or the trust instrument as to the disposition of the property in the event the in terrorem provision is violated.<sup>66</sup> However, in terrorem clauses cannot be enforced against a person who brings an action to interpret or enforce the will or trust, files a suit seeking an accounting or to remove the personal representative or trustee, or enters into a settlement agreement.<sup>67</sup> The Georgia Supreme Court has clarified that, where a beneficiary challenges the validity of a trust instrument itself—in that instance, through a claim of undue influence—and prevails on that challenge, the in terrorem clause contained in the instrument is also void and the beneficiary does not forfeit his or her interest simply by having brought such challenge in the first place.<sup>68</sup>

### Hawaii

In terrorem clauses are enforceable unless probable cause exists to challenge the will or trust instrument.<sup>69</sup>

### Idaho

Under an Idaho statute, which closely tracks UPC § 2-517, in terrorem clauses will be enforced so long as challenges are without probable cause.<sup>70</sup> Following the Restatement (Third) of the Law of Trusts § 96 (2008), Idaho also applies this rule to trust instruments.<sup>71</sup>

### Illinois

Illinois will enforce in terrorem clauses in wills, but they must be strictly construed and may not be enforced if the challenge is brought in good faith.<sup>72</sup> In terrorem clauses in trust instruments are similarly strictly construed to avoid forfeiture.<sup>73</sup>

### Indiana

In terrorem clauses in wills and trust instruments are enforceable in Indiana except in certain situations listed in Indiana Code § 29-1-6-2 (regarding wills) and § 30-4-2.1-3 (regarding trusts). These include where a beneficiary has "good cause" to bring an action, an agreement among beneficiaries to resolve an issue relating to an estate, a suit to determine whether a proposed action would amount to a contest, and an action seeking a court's construction of a will or trust instrument.<sup>74</sup> These statutes were enacted in 2018 and reversed a long-standing rule that in terrorem provisions were unenforceable.

### Iowa

Iowa enforces in terrorem clauses in wills unless a contest is brought in good faith and with probable cause.<sup>75</sup> In *Matter of Estate of Workman*, the court enforced the in terrorem clause not only against the petitioner but also his minor child because the clause's language stated that "filing" an action triggered forfeiture, and he had filed it on the child's behalf.<sup>76</sup> In terrorem clauses in trust instruments are presumably also enforceable in Iowa, though a court has not directly addressed this question.<sup>77</sup>

### Kansas

In terrorem clauses in wills are enforceable unless there is probable cause for the contest.<sup>78</sup> They are also enforceable in trusts with the same exceptions for probable cause.<sup>79</sup>

### Kentucky

While in terrorem clauses in wills and trust instruments are enforceable in Kentucky, they are to be strictly construed.<sup>80</sup> In *Commonwealth Bank & Trust v. Young*, children brought an action against their

father's estate stating that Commonwealth Bank made improper distributions to their father from the trusts established by their mother at her death for the father's benefit and that Commonwealth Bank breached its fiduciary duties. Nevertheless, the children's suit did not trigger the in terrorem clause because the children did not seek to invalidate terms of the trust; they sought only to challenge proper administration under the trust terms.<sup>81</sup>

### Louisiana

Louisiana enforces in terrorem clauses in wills and construes such provisions strictly.<sup>82</sup> Louisiana has not yet addressed the issue of the good faith and probable cause exception nor the enforceability of in terrorem clauses in trust instruments.

### Maine

In terrorem clauses are enforceable in wills in Maine in the absence of probable cause.<sup>83</sup> It is likely that in terrorem clauses in trust instruments would be enforced to the same extent because the same rules of construction that apply to wills apply to trusts.<sup>84</sup>

### Maryland

Maryland, like several states, adopts the Uniform Probate Code approach to enforcing in terrorem provisions in wills, which acknowledges the probable cause exception.<sup>85</sup> Maryland does not have any law regarding in terrorem provisions in trust instruments.

### Massachusetts

Massachusetts, addresses in terrorem provisions in wills through its statutes and in trusts through case law, both finding such provisions to be enforceable irrespective of good faith or probable cause.<sup>86</sup> Massachusetts courts will interpret these clauses narrowly, as forfeiture is disfavored.<sup>87</sup> The in terrorem clause in *Hanselman v. Frank* was triggered when the beneficiary sought to remove a trustee for failure to account to him, which the trustee did not have an obligation to do pursuant to the terms of the trust agreement.<sup>88</sup> Because the trust

instrument contained trustee succession provisions and accounting provisions, the beneficiary violated the in terrorem clause which provided that forfeiture occurred if there was a contest "to prevent any provision [of the trust agreement] from being carried out in accordance with its terms."<sup>89</sup> In *Ginsberg v. Ginsberg*,<sup>90</sup> a woman brought numerous claims against her brother, the trustee of their deceased parents' trusts. Her brother moved to dismiss the complaint, arguing that filing the suit alone triggered the in terrorem clause and resulted in forfeiture of her interest.<sup>91</sup> The court denied the motion, noting that if the sister "proves the trust instrument was procured by fraud, the entire instrument falls, including the no contest provision."<sup>92</sup> In addition, if her brother "invokes the no contest clause to defend against a failure to provide accountings of his conduct as trustee, the no contest clause is unenforceable as against public policy."<sup>93</sup>

### Michigan

Michigan adopts the Uniform Probate Code standard with respect to wills and trust instruments, enforcing in terrorem clauses unless probable cause exists to challenge the instrument.<sup>94</sup> In *In re Stan*,<sup>95</sup> a daughter of the deceased brought an action challenging the appointment of her sister as personal representative under the decedent's will. The sister subsequently sought to enforce the in terrorem clause contained in the decedent's revocable trust against the daughter. Although the challenge was to the sister's appointment as personal representative under the will and the in terrorem clause was contained in the trust instrument, the court nevertheless held that the trust instrument's in terrorem clause could potentially be applied to the daughter if her challenge fell within what the clause proscribed because the clause referenced challenges to the will and the will referenced the trust instrument.<sup>96</sup> In the end, though, the court refused to enforce the clause against the daughter because it found she had probable cause to believe her sister was mismanaging the decedent's estate.<sup>97</sup>



## Minnesota

Minnesota addresses in terrorem clauses only with regard to wills and will enforce them in the absence of probable cause.<sup>98</sup> Though not addressed in case law or statutes, Minnesota applies the same rules of interpretation to trusts as it does to wills.<sup>99</sup>

*In Re: B.C. Fox Trust*<sup>100</sup> held that a no-contest provision in a trust agreement can be violated by indirect as well as direct challenges, such as by causing another beneficiary to change the distribution of trust assets or opposing adverse claims by other beneficiaries.

## Mississippi

In terrorem clauses are unenforceable in wills in Mississippi when a challenge is brought in good faith and is based on probable cause.<sup>101</sup> *Parker v. Benoist* allowed the executor to be reimbursed out of the estate for legal fees incurred in defending the will and ruled that a provision in the in terrorem clause ostensibly requiring the unsuccessful contestants to pay the executor's legal fees was unenforceable. *In re Estate of Thomas v. Thomas*<sup>102</sup> involved a suit brought by two sisters as beneficiaries challenging the executor's administration of the estate. The court determined that the executor failed to provide a complete accounting, overfunded a trust contrary to terms of decedent's will, and failed to cooperate with the sisters regarding questions about the accounting.<sup>103</sup> The executor claimed the suit triggered the no-contest clause, but the court disagreed. Actions regarding maladministration do not contest or attack the terms of the will and to hold that would allow an executor or trustee to spend the estate's money "without accountability to anyone."<sup>104</sup>

In terrorem clauses are also enforceable in trust instruments in Mississippi pursuant to the express terms of the clause, regardless of good faith, unless probable cause exists for the legal action, which is based on a claim such as fraud, duress, or undue influence.<sup>105</sup> Presumably, attorneys' fees could be awarded among the parties under Mississippi Code § 91-8-1004. In terrorem clauses are not enforced in actions alleging a trustee's breach of fiduciary duty, actions seeking a determination on whether a

proposed proceeding would violate such provision, and actions by a beneficiary to interpret the terms of a trust, among others.<sup>106</sup>

## Missouri

Missouri will enforce in terrorem clauses without exception in both wills and trust instruments, though strictly construed.<sup>107</sup> Missouri courts originally adopted this position on wills under the theory that a private person may dispose of his or her property as he or she desired.<sup>108</sup> It is upon this same theory that such clauses are enforceable in trust instruments.<sup>109</sup> In *LaBantschnig v. Bohlmann*,<sup>110</sup> a beneficiary brought suit for breach of fiduciary duty against the trustee. The court refused to enforce the in terrorem provision against the beneficiary because he merely sought to enforce his rights under the trust, not to contest the trust's validity or vacate or alter any terms.<sup>111</sup> The court suggested, however, that it may be inclined to enforce an in terrorem clause that contains language specifically identifying actions for breach of fiduciary duty as grounds for forfeiture.

Missouri courts have indicated that there are limitations on the enforcement of in terrorem clauses. In a declaratory judgment action where a beneficiary alleged that the settlor lacked capacity to execute the trust amendment that contained the in terrorem clause, the court ruled that pursuing the claim would not trigger the clause because the issue of whether the instrument was validly executed determines the validity of the no-contest clause.<sup>112</sup>

## Montana

Montana also follows the UPC with regard to in terrorem clauses in wills and enforces such clauses in actions brought without probable cause.<sup>113</sup> Montana presumably enforces in terrorem clauses in trust instruments to the same extent.<sup>114</sup>

## Nebraska

Nebraska has not addressed in terrorem clauses in trust agreements but will enforce such clauses in wills unless there is probable cause for the contest.<sup>115</sup>

## Nevada

In *terrorem* clauses are enforceable in Nevada for wills and trust instruments alike “to the greatest extent possible ... because public policy favors enforcing the intent of the” testator or settlor,” without regard to probable cause or good faith.<sup>116</sup> However, both statutes detail a number of situations where such clauses aren’t enforceable, including where the legal challenge to invalidate the will or trust is brought in good faith and is based on probable cause grounded in an objective standard.<sup>117</sup> They are also not enforceable in actions by a devisee or beneficiary to enforce the terms of a will or trust instrument, to enforce his or her legal rights under a will or trust instrument, or to construe the will or trust instrument.<sup>118</sup>

Nevada law also details specific conduct that *can* result in forfeiture of a beneficiary’s interest, including: (i) conduct other than formal court action; (ii) initiating civil litigation against the testator’s estate or family; and (iii) interference with the administration of a trust or business.<sup>119</sup> Finally, Nevada law specifies that a personal representative or trustee may, in his, her, or its discretion, suspend distributions to a beneficiary whose conduct they believe violates an *in terrorem* clause, until a court has determined the issue.<sup>120</sup>

## New Hampshire

In *terrorem* clauses in New Hampshire are generally enforceable irrespective of good faith or probable cause unless the will or trust instrument is invalid due to “fraud, duress, undue influence, lack of testamentary capacity, or any other reason.”<sup>121</sup> In addition, *in terrorem* clauses are unenforceable against persons bringing an action against a fiduciary under the will or trust instrument if it is found that the fiduciary breached his or her duties.<sup>122</sup>

In *terrorem* clauses are also unenforceable in the following actions:

- Actions by a fiduciary unless the fiduciary is also a beneficiary to which the clause would apply;

- Agreements among beneficiaries or devisees to settle disputes relating to the will or trust instrument;
- Actions to determine whether a pending or proposed action would trigger the clause;
- Suits to construe; and
- Actions brought by the attorney general for construction of a charitable trust or charitable bequest or interest if charity may be penalized for challenging such provision with probable cause.<sup>123</sup>

An executor or trustee may suspend distributions to a beneficiary or suspend distribution pursuant to an exercise of a power of appointment if a beneficiary’s claim against the will or trust instrument would reduce or eliminate the beneficiary’s share under the will, the trust instrument, or the power of appointment.<sup>124</sup> If a fiduciary takes such action, the fiduciary is protected to the extent he or she acted in good faith.<sup>125</sup>

## New Jersey

New Jersey adopts the position that in *terrorem* clauses should be enforced unless probable cause exists to contest a will or a trust.<sup>126</sup> Such clauses discourage challenges to testamentary instruments and should be enforced on that basis.<sup>127</sup> Accordingly, there is no “logical reason why the purpose of the statute [regarding *in terrorem* clauses for wills] should not be presently recognized and be applied equally to trust instruments.”<sup>128</sup>

## New Mexico

New Mexico adopts the UPC approach with regard to wills and trusts and enforces *in terrorem* clauses absent probable cause.<sup>129</sup>

New Mexico case law indicates that enforceability requires more than just an analysis of probable cause. *Redman-Tafoya v. Armijo*<sup>130</sup> involved numerous challenges by the decedent’s daughter to actions of the executor of the estate. Prior to his death, the decedent created a separately platted lot for his daughter but did not deed the lot to her

before his death.<sup>131</sup> The decedent built a fence on his lot, a portion of which was situated within the easement on the decedent's property and adjacent to the daughter's property.<sup>132</sup> The daughter eventually built a house on her portion of the lot but failed to realize that the house encroached on the easement adjacent to decedent's property.<sup>133</sup> The decedent provided in his will that the land his daughter occupied was her "sole and separate property and shall not be considered for purposes of determining her equal share of the proceeds of my estate."<sup>134</sup> The decedent's in terrorem clause forbade contests to the will or any of its provisions.<sup>135</sup>

The easement encroachments were discovered in an attempt to sell the decedent's residence following his death, and the executor attempted to get the daughter to convey the easement to the estate, which the daughter refused.<sup>136</sup> Several actions ensued attempting to resolve the disposition of the decedent's land and the contentious easement, most of which were brought by the executor of the estate.<sup>137</sup> Eventually, the executor sought to disinherit the daughter for her persistent objection to resolution of the easement issue and for conspiring to take the place of the executor as challenges to the decedent's will in violation of the in terrorem clause.<sup>138</sup> In finding that the daughter's actions did not violate the clause, the court held that in terrorem clauses must be strictly construed.<sup>139</sup>

Broad contest or attack proscriptions such as that in the present case should be read as penalizing only beneficiaries who, in the absence of good faith and probable cause, seek through a legal proceeding to invalidate a provision of a will on grounds such as lack of testamentary capacity, fraud, undue influence, improper execution, forgery, or subsequent revocation by later document.<sup>140</sup>

The court did not address what would constitute a "specific" contest clause. More interesting, perhaps, is the court's assertion that broad clauses should only penalize beneficiaries for specific actions brought without probable cause and good faith, which is not a requirement of the statute.

## New York

New York generally enforces in terrorem clauses in wills irrespective of good faith and probable cause.<sup>141</sup> However, like California, New York carves out several exceptions to this general rule. In terrorem clauses are not enforceable: (i) against contests to establish forgery or revocation by later will if brought with probable cause; (ii) against contests brought by infants or incompetents; (iii) against objections to jurisdiction of the court where the will is offered for probate; (iv) for disclosure of information related to the document offered for probate as a will to parties or the court or disclosure of information relevant to the probate proceedings; (v) for refusal or failure to join in a petition for probate of a document as a last will or to execute a consent to or waiver of notice of probate; (vi) against suits to construe; or (vii) against preliminary examination of the proponent's witnesses, the preparer of the will, the nominated executors, and any other person the court determines may provide information.<sup>142</sup>

While no statute addresses in terrorem clauses in trust instruments, New York applies the same rules governing in terrorem clauses in wills.<sup>143</sup>

*Matter of Neva M. Strom Irrevocable Trust III* involved a trust instrument that provided:

As a condition of receiving any and all dispositions, bequests, devises, or other provisions under this Agreement..., a beneficiary shall not, directly or indirectly, for any cause or reason whatever, institute, abet, take part or share, directly or indirectly, in any action or proceeding to impeach, impair, set aside or invalidate any of the terms of this Agreement ... and if any such beneficiary does contest the terms of this Trust, the Grantor directs that any dispositions to or for the benefit of such beneficiary shall be forfeited and pass under this Trust as if such beneficiary had predeceased me without leaving issue surviving me.<sup>144</sup>

A child of the decedent had questioned whether the decedent had effectively transferred her dwelling to a trust. While acknowledging that "although

in *terrorem* clauses—also known as no contest clauses—are enforceable, ‘they are not favored and must be strictly construed,’ the court concluded that this clause was valid in this trust and the child’s interest in the trust was forfeited.<sup>145</sup> Looking at the plain meaning of the language in the above-quoted provision, this conclusion seems like a stretch.

### **North Carolina**

North Carolina case law supports enforceability of in *terrorem* clauses absent good faith and probable cause.<sup>146</sup> The question remains open with regard to trust instruments, but the same rules likely apply, since North Carolina applies the same rules of construction to trusts as it does to wills.<sup>147</sup>

### **North Dakota**

North Dakota adopts the UPC position that in *terrorem* clauses are enforceable in wills unless probable cause exists to bring an action.<sup>148</sup> The rules of construction applying to wills also apply to trust instruments in North Dakota.<sup>149</sup>

### **Ohio**

Ohio will enforce in *terrorem* clauses in wills without regard to probable cause or good faith.<sup>150</sup> The same rule applies to trusts.<sup>151</sup> An in *terrorem* clause is not enforceable against beneficiaries who were mere defendants in an action instituted by another beneficiary.<sup>152</sup>

### **Oklahoma**

Oklahoma enforces in *terrorem* clauses in wills in the absence of probable cause and strictly construes them.<sup>153</sup> Identical principles apply to the enforcement of such provisions in trust agreements.<sup>154</sup>

### **Oregon**

In *terrorem* clauses are enforceable in wills and trust instruments even with the existence of probable cause.<sup>155</sup> However, the clause will not be enforced if probable cause exists to challenge the instrument based on forgery or revocation.<sup>156</sup> Such clauses are also unenforceable if a fiduciary brings an action on

behalf of a protected person or a guardian ad litem brings an action on behalf of a minor, incapacitated, or financially incapable person.<sup>157</sup> In interpreting an in *terrorem* clause, Oregon courts “strictly construe them and do not extend them beyond their express terms.”<sup>158</sup>

### **Pennsylvania**

In *terrorem* clauses are enforceable in Pennsylvania unless probable cause exists to bring a challenge.<sup>159</sup> This rule is equally applicable to wills and trust instruments.<sup>160</sup> If a beneficiary files a petition seeking to enforce an in *terrorem* clause, a trial court’s denial of the petition after briefing but without a hearing violates the right to procedural due process guaranteed under the federal constitution.<sup>161</sup>

### **Rhode Island**

Rhode Island finds in *terrorem* clauses enforceable in wills with no exceptions for good faith or probable cause.<sup>162</sup> Providing for such exceptions would override the testator’s wishes, to which the court is required to give effect pursuant to the state’s statute on wills.<sup>163</sup> A similar rule likely applies to in *terrorem* clauses in trust instruments.<sup>164</sup>

### **South Carolina**

South Carolina courts enforce in *terrorem* provisions but honor the UPC’s probable cause exception with regard to both wills and trust instruments.<sup>165</sup>

### **South Dakota**

South Dakota has also adopted the UPC approach regarding in *terrorem* clauses in wills, acknowledging the probable cause exception.<sup>166</sup>

South Dakota has taken a slightly different approach to trusts, however. Generally, in *terrorem* clauses in trusts are enforceable unless there is probable cause to challenge the trust instrument on the basis of fraud, duress, revocation, lack of capacity, undue influence, mistake, forgery, or irregularity in execution.<sup>167</sup> Furthermore, such clauses are not enforceable against a beneficiary who in good faith, and with probable cause, contests provisions that benefit

the preparer of the trust instrument, the person who gave directions to the preparer regarding substantive or dispositive provisions of the trust instrument or any witness to the trust instrument.<sup>168</sup> In *terrorem* clauses may be enforced against a beneficiary who challenges the settlor's signature without probable cause if nonrelative witnesses, a nonrelative notary public, or both witnessed the settlor's signature.<sup>169</sup>

### Tennessee

Tennessee has addressed in *terrorem* clauses with respect to wills through case law and with respect to trusts in Tennessee's version of the Uniform Trust Code. In *terrorem* clauses in wills are enforceable unless good faith and probable cause exist to contest the will.<sup>170</sup> In *Winningham v. Winningham*, the testator went so far as to include language in the in *terrorem* clause stating that the clause was to apply even if good faith and probable cause existed.<sup>171</sup> The court found that the inclusion of such language was a violation of public policy and refused to enforce that portion of the clause, though the remainder of the clause remained valid.<sup>172</sup>

In *terrorem* clauses in trust instruments are enforceable whether or not a beneficiary brings the action in good faith, unless there is probable cause for the action based on fraud, duress, lack of capacity, undue influence, mistake, forgery, or irregularity in execution of the instrument.<sup>173</sup> However, this rule does not apply where, for example, a beneficiary alleges the trustee's breach of fiduciary duty, beneficiaries reached a nonjudicial settlement agreement, and a beneficiary seeks interpretation of a trust's terms or a determination as to whether a certain action would trigger an in *terrorem* clause.<sup>174</sup>

### Texas

In *terrorem* clauses in wills and trust instruments will be enforced if the contest was brought and maintained in good faith and there was just cause in bringing the action.<sup>175</sup> Furthermore, a settlor may not waive the applicability of Texas Property Code § 112.038 by the terms of the trust agreement.<sup>176</sup> A trustee who was also a trust beneficiary didn't trigger an in *terrorem* clause where his legal action

merely sought modification of administrative provisions and had no substantive effect on the distribution of trust property.<sup>177</sup>

### Utah

In Utah, an in *terrorem* clause in a will is unenforceable in an action instituted with probable cause.<sup>178</sup> Utah has not directly addressed the use of in *terrorem* clauses in trust instruments, but it does apply the same rules of construction to trust instruments and wills.<sup>179</sup>

### Vermont

Vermont has no authority, statutory or otherwise, regarding the enforceability of in *terrorem* provisions.

### Virginia

Virginia courts strictly enforce in *terrorem* clauses in both wills and trust instruments.<sup>180</sup> The *Womble v. Gunter* court upheld the use of such clauses in both instruments without exception so long as the challenge falls squarely within the scope of the clause.<sup>181</sup>

### Washington

In *terrorem* clauses in wills are enforceable in Washington only in the absence of good faith and probable cause.<sup>182</sup> Washington courts have also applied this rule to in *terrorem* clauses in trust instruments,<sup>183</sup> and the same rules of construction apply to the interpretation of wills as they do to trust instruments.<sup>184</sup>

Notably, *In re Estate of Gillespie* analyzes the issue of how a court should evaluate a beneficiary's claim he acted in good faith—and thus did not trigger the in *terrorem* clause—because he brought the suit on the advice of counsel.<sup>185</sup> The court held that the parties arguing against the enforcement of the in *terrorem* clause bear the burden of proving they brought the lawsuit in good faith based on the advice of counsel who was fully informed.<sup>186</sup> If the beneficiaries make this *prima facie* showing, they have established a rebuttable presumption of good faith that the other party can overcome by producing evidence showing a *lack* of good faith.<sup>187</sup>

## West Virginia

West Virginia enforces in terrorem clauses in wills unless the action is supported by probable cause and brought in good faith.<sup>188</sup> No case law or statute addresses the enforceability of such clauses in trust instruments, but the same rules of construction apply that apply to wills apply to trust instruments.<sup>189</sup>

## Wisconsin

Wisconsin will enforce in terrorem clauses in wills and trusts to the extent probable cause does not exist to bring the action.<sup>190</sup>

## Wyoming

In terrorem clauses in both trust instruments and wills are valid in Wyoming even if probable cause and good faith exist to bring a contest.<sup>191</sup> However, the *Dainton v. Watson* court seems to leave open the possibility that an in terrorem clause exempting actions brought in good faith and with probable cause would also be enforced.<sup>192</sup>

## SUITS TO CONSTRUE AS CONTESTS

“A suit to construe, reform or modify the language of a donative document is not a contest of the document and hence is not a violation of a no-contest clause, unless” the suit would invalidate all or a portion of the document.<sup>193</sup>

A suit to construe is widely viewed as a way of carrying out a testator’s intent and should not be a violation of an in terrorem clause.<sup>194</sup> A clause is triggered where a beneficiary is “attempting to set aside, contest or appeal from a decision sustaining the validity of an instrument.”<sup>195</sup> In contrast, a suit to construe is a “search for the true meaning of a will” and is not a way to side step the testator’s intention.<sup>196</sup>

In *Marx v. Rice*,<sup>197</sup> the husband gave his wife a power of appointment over certain assets of the estate after giving his only son a life estate in the same.<sup>198</sup> Upon the wife’s death, she exercised the power of appointment in favor of her various family members. The husband’s next of kin filed suit seeking enforcement of an in terrorem clause in the wife’s will. The clause

revoked the inheritance of “[a]ny person who may benefit by the provisions of this my last will, whether it be by the disposition of my own estate or in the exercise of the power of appointment by will given to me by my husband’s last will” if that person participated in proceedings objecting to the wife’s will.<sup>199</sup> The husband’s heirs at law sought to enforce this provision against certain individuals who benefited from the exercise of the power of appointment, claiming that they sought to challenge the wife’s will by seeking instruction with regard to income payable from a trust created under the wife’s will for her predeceased husband’s son.<sup>200</sup> If the challenge were successful, the portion of the assets appointed to those individuals through the exercise of the general power would be forfeited and distributed to the claimants. Specifically, the power of appointment benefactors sought instruction regarding whether income should be paid first from the husband’s estate or the wife’s estate.<sup>201</sup> This suit was not a violation of the in terrorem clause, however, because such clauses typically apply to “hostile” proceedings rather than “divergent interpretations of the will.”<sup>202</sup>

Suits that determine rightful ownership of property are typically found to be suits to construe the will.<sup>203</sup> In *Meyer v. Benelli*, the decedent’s will gave the house, furniture, and household effects to his wife for her life if she chose to live in the home. If she chose not to live in the home, then the house was to go to the decedent’s children.<sup>204</sup> The wife lived in the house for her life, and the executors of her estate took possession of the land and household effects upon her death. The executors of the husband’s estate brought suit arguing that the wife’s executors were in wrongful possession of the property, and the bequest required distribution of the land and household effects to the husband’s children upon the wife’s death.<sup>205</sup> The court found this was a suit to construe the will to determine who rightfully should have title to the property. It was not a suit attacking the provisions of the will and, therefore, the no-contest clause did not apply.<sup>206</sup>

Similarly, in *Doelle v. Bradley*,<sup>207</sup> the decedent’s daughter filed a creditor’s claim in California probate court stating that she had a right to one of

the decedent's Utah properties, which decedent devised to the son. This filing did not trigger the in terrorem clause because the daughter's goal was to "question the basic premise of [the mother's] will, that she owned all she purported to give away."<sup>208</sup> The daughter was, therefore, seeking construction as to the distribution provision of the property.

Claims by beneficiaries that do not directly request construction of a will have also been found to be suits to construe and, therefore, are outside the scope of an in terrorem clause.<sup>209</sup> In *In the Matter of Estate of Ikuta*, the decedent's first wife and children brought an action claiming that inclusion of certain real property in decedent's estate was improper and that reforming the trust provisions regarding decedent's children was against decedent's wishes.<sup>210</sup> Consequently, the decedent's second wife and youngest son claimed the actions challenging such determinations triggered the no-contest clause.<sup>211</sup> The court held that the actions by the first wife and children "were in the nature of construing the will," which was not a contest to the will.<sup>212</sup>

Many other states have adopted the approach of the courts as described above.<sup>213</sup>

## DECLARATORY JUDGMENT ACTIONS AS CONTESTS

Claimants most commonly bring declaratory judgment or declaratory relief actions seeking either: (i) an interpretation of the will or trust instrument; or (ii) a determination of whether a proposed action would trigger the in terrorem clause. Much like suits to construe, declaratory actions are widely held not to be attacks on the will and, therefore, as not triggering the in terrorem clause.

### Declaratory Judgment Action Seeking Interpretation

Not surprisingly, declaratory judgment actions seeking interpretation or construction of a will or trust instrument are generally not attacks on the will because they do not "attack[] or challenge[] the will or any part of it."<sup>214</sup>

Even states with strict construction rules view declaratory judgments seeking construction as outside the scope of an in terrorem clause.<sup>215</sup> *Di Portanova v. Monroe* involved distributions from a trust created for a partially incapacitated beneficiary. Ugo Di Portanova's grandparents established a trust for his benefit upon their deaths.<sup>216</sup> Ugo was partially incapacitated and, therefore, a guardian was appointed for his estate.<sup>217</sup> The trust created for Ugo provided that the trustees could make distributions in the beneficiary's best interest.<sup>218</sup> Ugo's guardian filed a declaratory judgment action seeking a determination as to whether the trust distribution provisions allowed the trustees to distribute assets to a new trust for the benefit of Ugo's caretakers with whom he resided.<sup>219</sup> Ugo's siblings argued that by filing the declaratory judgment action the guardian violated an in terrorem clause contained in the grandparents' wills.<sup>220</sup> The clause revoked the inheritance of any person who instituted a proceeding to "modify[], vary[], set[] aside, or nullify[]" provisions of the will even if brought by an individual acting on behalf of a beneficiary.<sup>221</sup> The court refused to enforce the in terrorem clause against Ugo because the guardian sought only an interpretation of the trust provisions contained in the wills and did not wish to alter the terms.<sup>222</sup>

Much like suits brought as declaratory judgment actions, suits to determine proper ownership of property are likely to be deemed suits to construe and, therefore, do not violate an in terrorem clause.<sup>223</sup> Decedent's son, in *George v. George*, brought suit seeking to determine what interest he had in a particular piece of real property.<sup>224</sup> The other children, seeking to benefit, claimed that by instituting the proceeding the son forfeited his rights under the in terrorem clause.<sup>225</sup> The son, however, did not forfeit his interest as this was not a "direct[] or indirect[] contest or attempt to contest the will," but rather to determine the meaning of the will and the son's appropriate interest in the property.<sup>226</sup>

## Declaratory Judgment Action Seeking Determination Regarding Proposed Action

New Hampshire, Delaware, Missouri, and Tennessee expressly provide by statute that in *terrorem* clauses are unenforceable against actions to determine whether a pending or proposed proceeding would constitute a contest that triggers the clause.<sup>227</sup> The Missouri Supreme Court has even confirmed that, if a beneficiary foregoes the opportunity to bring a declaratory judgment action under this “safe harbor” statute and a court finds his lawsuit to have triggered the in *terrorem* clause, he has forfeited his interest.<sup>228</sup> *Knopik v. Shelby Investments, LLC* is widely regarded as a “set-up,” that the Supreme Court of Missouri fell for, to demonstrate to the Missouri General Assembly that it should enact a statute prohibiting enforcement of a no-contest clause purporting to eliminate the beneficial interest of a person who initiates a breach of trust claim against a trustee or an action to remove a trustee.<sup>229</sup>

Claimants may wish to bring various types of suits attacking a will or trust instrument to enforce their rights (or purported rights), and seeking a declaratory judgment action is one way to determine whether bringing such a suit will cause a forfeiture under an in *terrorem* clause. For example, the claimant in *Krause v. Tullo*<sup>230</sup> sought to enforce a contract referenced in a will. The decedent’s will left 1/8 of the residue of the estate to the plaintiff.<sup>231</sup> A prior will, however, referenced a contract made between the decedent and her husband that plaintiff would receive 1/6 of the residue upon the death of the survivor of them.<sup>232</sup> Plaintiff then filed a declaratory judgment action seeking to determine whether a suit to enforce the contract would trigger the in *terrorem* clause.<sup>233</sup> The court found that the declaratory judgment action itself merely construed the in *terrorem* clause and did not impact the administration of the estate.<sup>234</sup>

Similarly, declaratory judgment actions seeking determinations regarding proposed actions are unlikely to trigger an in *terrorem* clause if the action is brought by a representative of the beneficiary.<sup>235</sup> In *Safai v. Safai*, the father established a trust for his son

upon the father’s death.<sup>236</sup> The mother, as guardian ad litem for the son, brought suit against the trust seeking a determination as to whether an action to set aside the trust on grounds of undue influence, fraud, and lack of capacity would trigger the in *terrorem* clause.<sup>237</sup> The applicable in *terrorem* clause in the father’s trust said “[a]ny beneficiary who directly or indirectly voluntarily participates in any proceeding” contesting the trust or the will shall be treated as if he or she predeceased the testator.<sup>238</sup> The trustees argued that the action brought by the mother on behalf of the son violated the clause. The court found there was no violation as the declaratory relief petition was not a trust contest and, therefore, could not trigger the clause.<sup>239</sup> Furthermore, the court held that the proposed action would also not trigger the clause because the in *terrorem* clause required the “voluntary” participation of a beneficiary. The son was incapable of voluntarily participating in the action as a minor and could not trigger the clause.<sup>240</sup>

## ISSUES ARISING IN A MOBILE SOCIETY

With today’s highly mobile society, it is impossible to know where a client will reside at his or her death. Consequently, it is impossible to know whether a client’s in *terrorem* clause(s) will be enforced in the jurisdiction in which he or she resides at death. For example, a client who has resided in Missouri (where in *terrorem* clauses are typically enforced even where good faith or probable cause exist) may end up a resident of Florida (where in *terrorem* clauses are unenforceable). In the coming years, courts are likely to see an increasing number of suits relating to in *terrorem* clauses that present multijurisdictional issues.

Take, for example, *Shamash v. Stark*.<sup>241</sup> In *Shamash*, the decedent previously resided in New York but died a resident of Florida. One of decedent’s sons brought suit in Florida contesting the will and the trust in the Florida probate proceeding.<sup>242</sup> This case was dismissed for lack of jurisdiction.<sup>243</sup> The same son subsequently filed suit in New York seeking construction of his father’s trust agreement, which was governed by New York law.<sup>244</sup> The trustees sought



dismissal of the New York complaint stating that the son did not have standing because the in terrorem clause was triggered by the son's contest in Florida.<sup>245</sup> The trust contained a "broad" in terrorem provision, which the court held was triggered by the son's petition contesting the trust in Florida.<sup>246</sup> The son argued that Florida's ban on in terrorem clauses was inapplicable to the New York proceeding because the Florida case was dismissed solely for lack of jurisdiction.<sup>247</sup> While New York permits suits to construe without penalty, the court held that the son triggered the no contest clause by filing a petition in Florida contesting the trust agreement and did not, therefore, have standing to sue in New York.<sup>248</sup>

As *Shamash* illustrates, courts and legislatures will need to anticipate the issues presented by similar factual circumstances.<sup>249</sup> Legislatures in states with existing in terrorem statutes should be strongly encouraged to get ahead of the issue by passing relevant legislation directly addressing multijurisdictional or cross-jurisdictional issues.<sup>250</sup> Legislatures should consider which state's law will apply in construing the in terrorem clause if the will or trust instrument is governed by state law other than that of the state of decedent's domicile at death, especially if the laws regarding in terrorem clauses differ. Furthermore, in light of *Shamash*, legislatures should address what happens when a beneficiary institutes separate proceedings in two or more states with divergent laws regarding in terrorem clauses. Should the law of the state in which the first proceeding was brought govern enforceability of the clause? Should the prior proceeding affect standing in the second state?<sup>251</sup>

Estate planning attorneys should give careful consideration to the use of these clauses as well in light of the increasingly mobile nature of clients. An analysis of the family dynamics and the concerns of the testator are essential in determining whether to use an in terrorem clause at all. If one is to be used, the attorney must consider whether a broad or specific clause is more appropriate. As discussed above, clauses take several forms, and courts tend to look to the clause for guidance and adhere strictly to the language of the documents to determine whether

a challenger's specific act falls within or without the scope of the in terrorem clause.

## CONCLUSION

In light of the various state laws and restrictions on in terrorem clauses, careful drafting is crucial to the enforcement and success of each clause. Practitioners should discuss with their clients the types of actions that trigger the clause. For example, should mere filing of a petition to contest trigger the clause? Or must the petition actually be adjudicated? In other words, should the beneficiary be penalized if he or she withdraws the petition before a hearing or before a response from the defendants? Depending on the facts, drafters may want to include language stating that providing financial support to others who bring a claim triggers the clause and forfeiture of their rights under the will or trust instrument.

Practitioners and drafters should go through the thought processes with the client and address specific questions relating to the use of these clauses. Consideration should be given to whether a challenge to specific provisions of the will or trust instrument should be enforceable to the same extent as a challenge to the validity of the entire will or trust instrument. Should the clause reference other documents such as documents that implement business succession plans? Should the clause be triggered by contests to the actions of an executor or trustee? Should the clause specifically state that the testator's intent is for the clause to apply irrespective of good faith or probable cause?<sup>252</sup> If the goal is to disinherit a particular family member due to his or her actions, should the clause also apply to the individual's children? Lastly, should the clause apply to suits brought on behalf of minor or incapacitated beneficiaries?<sup>253</sup>

Drafters should be cautious about including a "default" in terrorem provision in form documents. While it may make more sense in states that enforce such clauses without limitations for probable cause or good faith, such as Missouri and Ohio, there may be a tendency to forget about the importance of tailoring the clause to the client's specific concerns. ▀

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## Notes

- 1 See Gerry W. Beyer, Rob G. Dickinson, and Kenneth L. Wake, *The Fine Art of Intimidating Disgruntled Beneficiaries with In Terrorem Clauses*, 51 SMU L. Rev. 225, 229 (Jan. 1998).
- 2 See Kara Blanco and Rebecca E. Whitacre, *The Carrot and Stick Approach: In Terrorem Clauses in Texas Jurisprudence*, 43 Tex. Tech L. Rev. 1127, 1137-38 (Summer 2011).
- 3 David M. Swank, *No-Contest Clauses: Issues for Drafting and Litigating*, 29-DEC Colo. Law. 57, 59 (Dec. 2000).
- 4 See *Di Portanova v. Monroe*, 229 S.W.3d 324, 332 (Tex. Ct. App. 2006).
- 5 See Restatement (Third) of the Law of Property § 8.5 cmt. a. (2003).
- 6 *Harrison v. Morrow*, 977 So.2d 457, 458 (Ala. 2007).
- 7 Some also note the story of Adam and Eve as the first use of “threats to control behavior.” Beyer, Dickinson, and Wake, *supra* note 1, at 230; see, also, Blanco and Whitacre, *supra* note 2, at 1130.
- 8 See Beyer, Dickinson and Wake, *supra* note 1, at 230.
- 9 *Id.* at 231.
- 10 *Id.*
- 11 See Blanco and Whitacre, *supra* note 2, at 1134-35.
- 12 See Beyer, Dickinson, and Wake, *supra* note 1, at 231-33 (“He who alters this—may God expel him from the kingdom of heaven to the torments of hell...” “He who wishes to alter this will ... may God destroy him now and on the Day of Judgment. Amen.”).
- 13 *Id.* at 235.
- 14 See Blanco and Whitacre, *supra* note 2, at 1134.
- 15 *Id.*
- 16 *Id.*
- 17 See Beyer, Dickinson, and Wake, *supra* note 1, at 235-36.
- 18 *Id.* at 236.
- 19 *Id.* at 236-37.
- 20 *Id.* at 239.
- 21 *Id.*
- 22 *Id.*
- 23 *Id.* at 240; *Bradford v. Bradford*, 19 Ohio St. 546, 547 (Ohio 1869).
- 24 See *Smithsonian Institution v. Meech*, 169 U.S. 398, 415 (1898).
- 25 See Fla. Stat. §§ 732.517, 736.1108 (2022).
- 26 Restatement (Third) of the Law of Property § 8.5 (2003).
- 27 See Restatement (Third) of the Law of Property § 8.5 cmt. c. (2003).
- 28 See Restatement (Third) of the Law of Property § 8.5 cmt. i. (2003).
- 29 See Alaska Stat. §§ 13.16.555 (2022) (regarding wills); 13.36.330 (regarding trusts).
- 30 See *Harrison v. Morrow*, 977 So.2d 457, 460 (Ala. 2007); *Kershaw v. Kershaw*, 848 So.2d 942, 955 (Ala. 2002).
- 31 *Harrison*, 977 So.2d at 458.
- 32 *Id.* at 460 (emphasis added).
- 33 *Id.* at 461-62.
- 34 Alaska Stat. § 13.16.555.
- 35 Alaska Stat. § 13.36.330.
- 36 Ariz. Rev. Stat. Ann. § 14-2517.
- 37 See *In re Shaheen Tr.*, 341 P.3d 1169, 1171 (Ariz. Ct. App. 2015); see also Ariz. Rev. Stat. Ann. § 14-10113 (codifying the “probable cause exception” portion of Shaheen).
- 38 *Matter of Wulf*, 418 P.3d 906, 908 (Ariz. Ct. App. 2017).
- 39 *Matter of ABB Trust*, 491 P.3d 1120 (Ariz. Ct. App. 2021).
- 40 See *Sharp v. Sharp*, 447 S.W.3d 622, 627 (Ark. Ct. App. 2014) (enforcing an in terrorem clause where a son made a “direct” attack on his father’s will).
- 41 See *Seymour v. Biehlich*, 266 S.W.3d 722, 725-28 (Ark. 2007) (citing case law from Oklahoma, Colorado, and California recognizing the reasonable cause exception to will challenges where an in terrorem clause is at issue and holding that the daughter would be exempt from application of the in terrorem clause if she acted in good faith).
- 42 See *Scott v. Scott*, 2016 Ark. Ct. App. 390, 499 S.W.3d 653, 658 (2016).
- 43 Cal. Prob. Code §§ 21311(a)(1) and 21315.
- 44 Cal. Prob. Code § 21310(b).
- 45 See Cal. Prob. Code § 21311(a)(2)-(3).
- 46 *Neyama v. Sugishita*, 2022 WL 4230917 (Cal. Ct. App. Sept. 14, 2022).
- 47 See Colo. Rev. Stat. §§ 15-12-905, 15-11-517.
- 48 See *In re Estate of Pepler*, 971 P.2d 694, 697 (Colo. App. 1998) (remanding case for determination of whether probable cause existed after determination that contestant acted in good faith).
- 49 Colo. Rev. Stat. § 15-5-112 (providing that the rules of construction that apply to the interpretations of wills also apply to trusts); *Sandstead-Corona v. Sandstead*, 415 P.3d 310, 321-22 (Colo. 2018) (where a decedent had executed a pour-over will that specifically incorporated the trust’s terms, which included an in terrorem clause referring only to contesting “this Trust”).
- 50 *Sandstead-Corona*, 415 P.3d at 322.
- 51 See *Griffin v. Sturges*, 40 A.2d 758, 760-61 (Conn. 1944); *Thompson v. Estate of Thompson*, 1999 WL 311241, \*4 (Conn. Super. 1999).
- 52 *Salce v. Cardello*, 269 A.3d 889, 895 (Conn. App. 2022).
- 53 *Id.*
- 54 *Id.* at 898.
- 55 *Id.* at 897 n. 8.
- 56 Del. Code Ann. tit. 12 § 3329.
- 57 *Id.*

- 58 See *Ackerman v. Genevieve Ackerman Family Trust*, 908 A.2d 1200, 1203 (App. D.C. 2006); see also *Barry v. Am. Security & Trust Co.*, 135 F.2d 470 (App. D.C. 1943).
- 59 *Ackerman*, 908 A.2d at 1203 (quoting *Barry*, supra).
- 60 Fla. Stat. §§ 732.517, 736.1108.
- 61 See *Dinkins v. Dinkins*, 120 So.3d 601, 602 (Fla. 5th DCA 2013).
- 62 *Id.* at 602.
- 63 *Id.*
- 64 *Id.* at 603.
- 65 *Id.*
- 66 Ga. Code Ann. §§ 53-4-68 (regarding wills), 53-12-22 (regarding trusts); see *Cox v. Fowler*, 614 S.E.2d 59, 60-61 (Ga. 2005) (finding in *terrorem* clause valid where gift over was to residue of estate).
- 67 See Ga. Code Ann. §§ 53-4-68, 53-12-22.
- 68 *Slosberg v. Giller*, 876 S.E.2d 228, 236-38 (rev'g *Giller v. Slosberg*, 858 S.E.2d 747 (Ga. Ct. App. 2021)). What was the appellate court thinking??
- 69 Haw. Rev. Stat. §§ 560:2-517 (regarding wills), 560:3-905 (regarding trusts).
- 70 *Ida. Code Ann.* § 15-3-905.
- 71 *Ferguson v. Ferguson*, 473 P.3d 363, 373 (*Ida.* 2020) (declining to enforce the in *terrorem* clause where trustees “attempt[ed] to use the forfeiture provision to remove [the plaintiff] as a beneficiary as a penalty for his seeking” accounting records to which he was entitled and did not receive).
- 72 See *Wojtalewicz’s Estate v. Woitel*, 418 N.E.2d 418, 420-21 (Ill. App. Ct. 1981) (holding that enforcing the in *terrorem* clause where executor failed to timely admit will to probate and endangered estate assets would violate public policy); *Estate of Mank*, 699 N.E.2d 1103, 1107 (Ill. App. Ct. 1998) (also refusing to enforce in *terrorem* clause as against public policy given the facts but noting they are generally enforceable).
- 73 *Ruby v. Ruby*, 973 N.E.2d 361, 369 (Ill. App. Ct. 2012).
- 74 *Ind. Code* §§ 29-1-6-2 and 30-4-2.1-3.
- 75 See *In re Cocklin’s Estate*, 17 N.W.2d 129, 135 (Iowa 1945) (modifying holding in *Moran v. Moran*, 123 N.W. 202 (Iowa 1909), by adding good faith and probable cause requirements as “in the interest of good public policy” and noting trend in other jurisdictions toward adopting these two exceptions); see, also, *Geisinger v. Geisinger*, 41 N.W.2d 86, 92-93 (Iowa 1950); *Matter of Estate of Workman*, 898 N.W.2d 204, 2017 WL 706342, at \*2-6 (Iowa Ct. App. 2017) (discussing the good faith and probable cause standards in depth and applying them to a number of relevant facts).
- 76 *Matter of Estate of Workman*, 898 N.W.2d 204, 2017 WL 706342, at \*6 (Iowa Ct. App. 2017).
- 77 *Id.* at \*1-2 (noting the decedent had included in *terrorem* clauses in both the will and trusts she had created, but only the will was challenged).
- 78 See *In re Estate of Foster*, 376 P.2d 784, 786 (Kan. 1962); *In re Barfoot*, 2008 WL 4661911, at \*11 (Kan. App. 2008).
- 79 See K.S.A. § 58a-112; *Hamel v. Hamel*, 299 P.3d 278, 290 (Kan. 2013); *Tustin v. Baker*, 2005 WL 2254497, at \*5 (Kan. 2005).
- 80 See *Boone v. Hoskins*, 613 S.W.3d 45, 47 (Ky. Ct. App. 2020); *Dravo v. Liberty Nat’l Bank & Trust Co.*, 267 S.W.2d 95, 98-99 (Ky. 1954); *Commonwealth Bank & Trust v. Young*, 361 S.W.3d 344, 352 (Ky. Ct. App. 2012) (citing *Hurley v. Blankenship*, 267 S.W.2d 99, 100 (Ky. 1954)); *Ladd v. Ladd*, 323 S.W.3d 772, 780 (Ky. Ct. App. 2010).
- 81 *Commonwealth Bank*, 361 S.W.3d at 353-54; see, also, *Strunk v. Lawson*, 447 S.W.3d 641, 649 (Ky. Ct. App. 2013) (declining to enforce in *terrorem* clause where the petitioner’s “singular purpose was to interpret the will and establish how the estate should be distributed”).
- 82 See *Succession of Robinson*, 277 So.3d 454, 458-59 (La. App. 2d Cir. 2019); *Succession of Laborde*, 251 So.3d 461, 465 (La. App. 2018); *Succession of Scott*, 950 So.2d 846, 848-49 (La. App. 1 Cir. 2006) (finding that contestant was not a “named legatee” as required by the plain language of the in *terrorem* clause, but not otherwise invalidating the provision).
- 83 *Me. Rev. Stat. tit. 18-C* § 3-905 (similar in approach to *UPC* § 2-517).
- 84 *Me. Rev. Stat. tit. 18-B* § 112.
- 85 *Md. Code Ann., Est. & Trusts* § 4-413.
- 86 *Mass. Gen. Laws ch. 190B*, § 2-517 and *ch. 203E*, §112; see also *Hanselman v. Frank*, Case No. 09-P-1490, 2010 WL 2507827, at \*2 (Mass. App. Ct. June 23, 2010).
- 87 *Savage v. Oliszcak*, 928 N.E.2d 995, 998 (Mass. App. 2010).
- 88 *Hanselman*, 2010 WL 2507827, at \*2.
- 89 *Id.* at \*1-2.
- 90 *Ginsberg v. Ginsberg*, 2017 WL 7693445, at \*2 (Mass. Super. Dec. 15, 2017).
- 91 *Id.*
- 92 *Id.* at \*6 (“[I]t is an all or nothing venture by the challenging party.”).
- 93 *Id.*
- 94 *Mich. Comp. Laws* §§ 700.3905 and 700.2518 (regarding wills); 700.7113 (regarding trusts).
- 95 *In re Stan*, 301 N.W.2d 498 (Mich. App. 2013).
- 96 *Id.* at 503.
- 97 *Id.* at 503-04.
- 98 *Minn. Stat.* § 524.2-517.
- 99 *Minn. Stat.* § 501C.0112.
- 100 *In Re: B.C. Fox Trust*, 2022 WL 1073756 (Minn. Ct. App. April 11, 2022).
- 101 See *Parker v. Benoist*, 160 So.3d 198, 203 (Miss. 2015) (concluding that enforcing such clauses without the good faith and probable cause exception would violate the state constitution and public policy).
- 102 *In re Estate of Thomas v. Thomas*, 28 So.3d 627 (Miss. App. 2009).
- 103 *Id.* at 633-37.
- 104 *Id.* at 638 (emphasis in original).

- 105 Miss. Code Ann. § 91-8-1014(b).
- 106 Miss. Code Ann. § 91-8-1014(c).
- 107 See *Commerce Trust Co. v. Weed*, 318 S.W.2d 289, 301 (Mo. 1958); *Cox v. Fisher*, 322 S.W.2d 910, 914 (Mo. 1959); *Chamber's Estate v. Chambers*, 18 S.W.2d 30, 36 (Mo. 1929) (regarding wills); *Chaney v. Cooper*, 954 S.W.2d 510, 519 (Mo. App. W.D. 1997) (regarding wills); *Rossi v. Davis*, 133 S.W.2d 363, 369 (Mo. 1939) (regarding trusts); *Estate of Buder*, 2022 WL 17096654, at \*4-7 (Mo. App. E.D. 2022) (finding that a beneficiary seeking an accounting did not violate the in terrorem clause by seeking an accounting because the clause did not prohibit a challenge to the trustee's actions but did violate the clause by seeking appointment of a special fiduciary, which directly contradicted the provision of the trust appointing trustees).
- 108 See *Chamber's Estate*, 18 S.W.2d at 31, 35-36.
- 109 See *Rossi*, 133 S.W.2d at 369-72.
- 110 *LaBantschnig v. Bohlmann*, 429 S.W.3d 269 (Mo. App. E.D. 2014).
- 111 *Id.* at 275.
- 112 *Finkle-Rowlett Revocable Trust Dated Aug. 28, 2009 v. Stiens*, 558 S.W.3d 95 (Mo. Ct. App. 2018). See also, *Rouner v. Wise*, 446 S.W.3d 242, 260 (Mo. 2014) (holding that decedent's children did not violate the in terrorem clause by defending the lawsuit brought by the decedent's stepchildren); *Tobias v. Korman*, 141 S.W.3d 468, 472-73, 477 (Mo. App. E.D. 2004) (enforcing the in terrorem clause only against the beneficiaries of a trust who knew of the clause's existence before filing a claim against the trust).
- 113 Mont. Code Ann. § 72-2-537; see *Matter of Estate of Poston*, 2022 WL 3368504, \*2-3 (Mont. 2022) (enforcing in terrorem clause against siblings who lacked probable cause to contest will); *Matter of Estate of Carpenter*, 2017 WL 6617077, at \*2-3 (Mont. 2017) (same).
- 114 Mont. Code Ann. § 72-38-112.
- 115 Neb. Rev. Stat. § 30-24,103; see *In re Estate of Barger*, 931 N.W.2d 660, 673-75 (Neb. 2019) (declining to enforce in terrorem clause where there was probable cause to challenge will).
- 116 Nev. Rev. Stat. §§ 137.005(1) (regarding wills); 163.00195(1) (regarding trusts).
- 117 Nev. Rev. Stat. §§ 137.005(4)(d); 163.00195(4)(e).
- 118 Nev. Rev. Stat. §§ 137.005(4)(a); 163.00195(4)(a).
- 119 Nev. Rev. Stat. §§ 137.005(3); 163.00195(3).
- 120 Nev. Rev. Stat. §§ 137.005(7); 163.00195(6).
- 121 N.H. Rev. Stat. Ann. §§ 551:22(II); 564-B:10-1014(b).
- 122 See N.H. Rev. Stat. Ann. §§ 551:22(II); 564-B:10-1014(b).
- 123 N.H. Rev. Stat. Ann. §§ 551:22(III); 564-B:10-1014(c).
- 124 N.H. Rev. Stat. Ann. §§ 551:22(VI)-(VII); 564-B:10-1014(f), (g).
- 125 N.H. Rev. Stat. Ann. §§ 551:22(VIII); 564-B:10-1014(h).
- 126 N.J. Stat. Ann. § 3B:3-47 (regarding wills); *Haynes v. First Nat'l State Bank of N.J.*, 432 A.2d 890, 903-04 (N.J. 1981) (regarding trusts).
- 127 See *Haynes*, 432 A.2d at 903.
- 128 *Id.* See generally Steven K. Mignogna, *The Forgotten Weapon: Enforceability of In Terrorem Clauses*, N.J. Bar Assoc., *Real Prop., Probate & Trust* (Apr. 1998).
- 129 N.M. Stat. Ann. §§ 45-2-517; 45-1-201(20); *Klecan v. Santillanes*, 643 Fed. Appx. 743, 750 (10th Cir. 2016) (assuming, without discussion, that the rule for wills applies to trusts too under New Mexico law).
- 130 *Redman-Tafoya v. Armijo*, 126 P.3d 1200 (N.M. App. 2005).
- 131 *Id.* at 1201-02.
- 132 *Id.* at 1201.
- 133 *Id.*
- 134 *Id.* at 1202.
- 135 *Id.*
- 136 *Id.*
- 137 *Id.* at 1202-04.
- 138 *Id.* at 1202.
- 139 *Id.* at 1212.
- 140 *Id.*
- 141 N.Y. Est. Powers & Trusts Law § 3-3.5(b).
- 142 N.Y. Est. Powers & Trusts Law § 3-3.5(b)(1) to (3).
- 143 See *Matter of Neva M. Strom Irrevocable Trust III*, 164 N.Y.S.3d 293, 295 (N.Y. App. Div. 3d Dept. 2022) (finding that beneficiary's extensive discovery in probate of will "went beyond what is authorized by [statute], in violation of the grantor's intent as explicitly expressed in the no contest clause" in the trust); *Matter of Stralem*, 695 N.Y.S.2d 274, 279 (Surr. Ct. Nassau Cty. 1999).
- 144 *Matter of Neva M. Strom Irrevocable Trust III*, 164 N.Y.S.3d 293, 295 (N.Y. App. Div. 3d Dept. 2022).
- 145 *Id.*
- 146 See *Ryan v. Wachovia Bank & Trust Co.*, 70 S.E.2d 853, 855 (N.C. 1952).
- 147 N.C. Gen. Stat. § 36C-1-112.
- 148 N.D. Cent. Code § 30.1-20-05.
- 149 N.D. Cent. Code § 59-09-12; *Langer v. Pender*, 764 N.W.2d 159, 169 (N.D. 2009).
- 150 See *Bender v. Bateman*, 168 N.E. 574, 575 (5th Dist. Muskingum Cty. 1929) (stating a probable cause or good faith exception "would in fact destroy the rule itself"); *Modie v. Andrews* 2002 WL 31386482, at \*4 (Ohio App. 9th Dist. 2002).
- 151 *Matter of Estate of Reck*, 2022 WL 729324, at \*3-4 (Ohio App. 9th Dist. 2022); *Foelsch v. Farson*, 153 N.E.3d 601, 611 (Ohio App. 5th Dist. 2020); *PNC Bank, Ohio, N.A. v. Roy*, 788 N.E. 650, 655 (Ohio App. 2003).
- 152 See *Modie*, 2002 WL 31386482, at \*4.
- 153 See, e.g., *Bridgeford v. Estate of Chamberlin*, 573 P.2d 694, 696 (Okla. 1977); *Whitmore v. Smith*, 221 P. 775, 777 (Okla. 1923); *In re Massey* 964 P.2d 238, 240 (Okla. Civ. App. 1998); *Matter of Estate of Westfahl*, 674 P.2d 21, 24 (Okla., 1983).
- 154 See *In re Wallace Revocable Trust*, 219 P.3d 536, 539 (Okla. 2009); *Barr v. Dawson*, 158 P.3d 1073, 1075 (Okla. Civ. App. 2006) (stating that public policy favors such provisions in

- wills because they protect against costly litigation and that same policy should apply to trusts).
- 155 Or. Rev. Stat. §§ 112.272(1) (regarding wills); 130.235(1) (regarding trusts).
- 156 Or. Rev. Stat. §§ 112.272(2); 130.235(2).
- 157 Or. Rev. Stat. §§ 112.272(3); 130.235(3).
- 158 Fenner v. Fenner, 405 P.3d 159, 162 (Or. App. 2017).
- 159 20 Pa. Cons. Stat. § 2521.
- 160 Id.
- 161 Estate of Powell, 209 A.3d 373, 379 (Pa. Super. 2019).
- 162 See Elder v. Elder, 120 A.2d 815, 819-20 (R.I. 1956) (stating that a forfeiture clause does not violate law or public policy).
- 163 Id.
- 164 Fiduciary Trust Co. v. Michou, 54 A.2d 421, 426 (R.I. 1947).
- 165 S.C. Code Ann. §§ 62-3-905 (regarding wills); 62-7-605 (regarding trusts); see, also, Russell v. Wachovia Bank, N.A., 633 S.E.2d 722, 726 (S.C. 2006).
- 166 S.D. Codified Laws §§ 29A-2-517; 29A-3-905.
- 167 S.D. Codified Laws § 55-1-46.
- 168 S.D. Codified Laws § 55-1-48.
- 169 S.D. Codified Laws § 55-1-49.
- 170 See, e.g., Winningham v. Winningham, 966 S.W.2d 48, 51-52 (Tenn. 1998).
- 171 Id. at 49.
- 172 See id. at 52 (stating that to allow a testator to provide such an exception would thwart the courts' ability to determine whether a will is valid and in compliance with the law).
- 173 T.C.A. § 35-15-1014(b).
- 174 T.C.A. § 35-15-1014(c).
- 175 Tex. Est. Code § 254.005 (regarding wills); Tex. Prop. Code § 112.038 (regarding trusts).
- 176 See Tex. Prop. Code § 111.0035(b)(6).
- 177 Marshall v. Marshall, 2021 WL 208459, at \*6 (Tex. App. 2021).
- 178 Utah Code §§ 75-3-905; 75-2-515.
- 179 Utah Code § 75-7-111.
- 180 See Hunter v. Hunter, 838 S.E.2d 721, 728-29 (Va. 2020); Keener v. Keener, 682 S.E.2d 545 (Va. 2009); Womble v. Gunter, 95 S.E.2d 213, 218-20 (Va. 1956).
- 181 Womble v. Gunter, 95 S.E.2d at 218-20; Keener v. Keener, 682 S.E.2d 545, 548-49 (Va. 2009).
- 182 See In re Estate of Gillespie, 456 P.3d 1210, 1218 (Wash. App. Div. 1 2020); Matter of Estate of Primiani, 198 Wash. App. 1067, at \*5 (Wash. App. Div. 3 2017); Estate of Kubick v. Potter, 513 P.2d 76, 79-80 (Wash. App. Div. 2 1973).
- 183 In re Estate of Mumby, 982 P.2d 1219, 1223-24 (Wash. App. Div. 2 1999).
- 184 R.C.W. § 11.97.020.
- 185 In re Estate of Gillespie, 456 P.3d 1210, 1218-20 (Wash. App. Div. 1 2020)
- 186 Id. at 1218.
- 187 Id. (noting that such evidence could be “the intentional violation of a court order, dishonesty, improper or sinister motive, the lack of any factual basis for the asserts claims, or the intentional withholding of material factual information from counsel”).
- 188 See Dutterer v. Logan, 137 S.E. 1, 2-3 (W. Va. 1927) (relying on weight of other English and American cases recognizing the exception because a suit could be to enforce a “substantial right”).
- 189 W.Va. Code § 44D-1-112.
- 190 Wis. Stat. §§ 854.01(2); 854.19; James v. Estate of Wicke, 2018 WL 2328228, at \*5 (Wis. Ct. App. 2018).
- 191 See EGW v. First Fed. Sav. Bank of Sheridan, 413 P.3d 106, 110 (Wyo. 2018); Briggs v. Wyoming Nat'l Bank of Casper, 836 P.2d 263, 266 (Wyo. 1992); Dainton v. Watson, 658 P.2d 79, 81-82 (Wyo. 1983).
- 192 See Dainton, 658 P.2d at 81. (“The no-contest or in terrorem clause...did not exempt those who challenged the will in good faith and with probable cause from its provisions... [T]o have applied the terms of the will in [that manner] would require judicial construction where construction would be clearly improper.”). See also McDill v. McDill (In re The Phyllis V. McDill Revocable Trust), 506 P.3d 753 (Wyo. March 22, 2022), in which the court held that summary judgment confirming the trust instrument’s validity resulted in an “unsuccessful contest,” thus triggering the in terrorem clause.
- 193 Restatement (Third) of the Law of Property § 8.5 cmt. d. (2003).
- 194 See, e.g., Hicks v. Rushin, 185 S.E.2d 390, 392 (Ga. 1971); Marx v. Rice, 65 A.2d 48, 54 (N.J. 1949).
- 195 In re Ervin’s Estate, 79 A.2d 264, 265 (Pa. 1951).
- 196 Hicks, 185 S.E.2d 390; Upham v. Upham, 200 S.W.2d 880, 883 (Tex. Ct. App. 1947).
- 197 Marx v. Rice, 65 A.2d 48 (N.J. 1949).
- 198 Id. at 50.
- 199 Id. at 53.
- 200 Id.
- 201 Id.
- 202 Id. at 54.
- 203 See, e.g., Meyer v. Benelli, 415 P.2d 415, 418 (Kan. 1966).
- 204 Id. at 417.
- 205 Id.
- 206 Id.
- 207 Doelle v. Bradley, 784 P.2d 1176 (Utah 1989).
- 208 Id. at 1179.
- 209 See In the Matter of Estate of Ikuta, 639 P.2d 400, 402 (Haw. 1981).
- 210 Id.
- 211 Id. at 407.
- 212 Id. at 407-08.
- 213 See, e.g., Del. Code Ann. tit. 12 § 3329; Nev. Rev. Stat. §§ 137.005(4); 163.00195(4); N.H. Rev. Stat. Ann. §§ 551:22(III), 564-B:10-1014(c); N.Y. Est. Powers & Trusts Law § 3-3.5(b)

(3)(E); *Langer v. Pender*, 764 N.W.2d 159, 169 (N.D. 2009);  
*In re Ervin's Estate*, 79 A.2d 264, 265 (Pa. 1951).

214 *Mazzola v. Myers*, 296 N.E.2d 481, 491 (Mass. 1973).

215 See *Di Portanova v. Monroe*, 229 S.W.3d 324, 333 (Tex. Ct. App. 2006).

216 *Id.* at 327.

217 *Id.* at 328.

218 *Id.* at 327-28.

219 *Id.* at 328.

220 *Id.* at 328-29.

221 *Id.* at 332.

222 *Id.* at 333.

223 See *George v. George*, 141 S.W.2d 558, 560 (Ky. Ct. App. 1940).

224 *Id.* at 559.

225 *Id.* at 559-60.

226 *Id.*

227 See Del. Code Ann. tit. 12 § 3329(b); N.H. Rev. Stat. Ann. §§ 551:22(III); 564-B:10-1014(c); Mo. Rev. Stat. §§ 456.4-420 and 474.395; T.C.A. § 35-15-1014(c).

228 *Knopik v. Shelby Investments, LLC*, 597 S.W.3d 189, 191-93 (Mo. 2020).

229 *Id.*

230 *Krause v. Tullo*, 835 S.W.2d 488 (Mo. App. S.D. 1992).

231 *Id.* at 489.

232 *Id.*

233 *Id.* at 490.

234 *Id.* at 491.

235 *Safai v. Safai*, 78 Cal. Rptr. 3d 759, 763-64 (App. 6th Dist. 2008).

236 *Id.* at 762-63.

237 *Id.* at 764.

238 *Id.* at 763.

239 *Id.* at 767.

240 *Id.* at 767-69.

241 *Shamash v. Stark*, NYLJ, 6/16/2009, at 38 col. 2.

242 *Id.* at \*1.

243 *Id.* at \*2.

244 *Id.* at \*1.

245 *Id.*

246 *Id.* (The clause at issue revoked the inheritance of a trust beneficiary who “contests or attacks this trust or any of the provisions [t]hereof.”).

247 *Shamash v. Stark*, NYLJ, 6/16/2009, at 38 col. 2 at \*2.

248 *Id.* at \*3.

249 See *Blanco and Whitacre*, *supra* note 2, at 1173.

250 *Id.* at 1174.

251 *Id.* at 1173-74 (offering suggested language for the Texas legislature on this issue).

252 But see *Winningham v. Winningham*, 966 S.W.2d 48, 53 (Tenn. 1998) (holding that the portion of the clause

applying to contests brought in good faith and with probable cause was against public policy).

253 See, e.g., N.Y. Est. Powers & Trusts Law § 3-3.5(b)(1) to (3) (exempting suits brought by infants and incompetents from enforceability); *Safai*, 78 Cal. Rptr. 3d 759 (regarding suit brought by guardian ad litem on behalf of minor beneficiary).