IN TERROREM CLAUSES
ARE THEY STILL TERRIFYING?

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I. INTRODUCTION

American law generally grants a high degree of freedom to testators.[1] Central to the law of gratuitous transfers is a freedom of disposition.[2] Freedom of disposition has been called the "cornerstone of the Anglo-American law of succession."[3] Thus, American law acknowledges a right to give rather than a right to receive.[4] A potential beneficiary, even the testator's child, has a mere expectancy and nothing more.[5]

As part of exercising their freedom of disposition, many testators and settlors insert "no-contest," "forfeiture," or "*in terrorem*" clause language in their wills or trusts in an attempt to deter a beneficiary from challenging the validity of the instrument or taking other action which may thwart the testator's testamentary plan.[6] *In terrorem* is Latin for "so as to produce terror by way of threat or intimidation," or "serving or intended to threaten or intimidate."[7] The thought is that such a clause would instill terror in the contestant and would persuade the contestant not to challenge the will or trust due to the risk of ending up with nothing.[8] Under a standard scenario, the testator makes a bequest to the beneficiary (although not always) and then inserts a clause which forces the beneficiary to either accept the gift under the will or trust or to contest the instrument with the hope of setting aside the testator's intended disposition.[9] A typical *in terrorem* clause is as follows:

> "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

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1. *See* RESTATEMENT (THIRD) OF PROPERTY § 10.1 cmt. 2 (AM. LAW INST. 2003).
2. *Id.*
3. J. Andrew Heaton, *The Intestate Claims of Heirs Excluded by Will: Should "Negative Wills" Be Enforced?*, 52 U. CHI. L. REV. 177, 183 n.35 (1985).
4. *Id.*
5. *See* Joseph DeFoe, *Vested Rights Versus Mere Expectancy*, dennisfordham.com/vested-rights-versus-mere-expectancy/ (last visited Oct. 7, 2017).
6. *See In re* Estate of Seymour, 600 P.2d 274, 278 (N.M. 1979) (noting that when a beneficiary contests a will in the face of a no-contest provision, he does so at the peril of his bequest).
7. *In terrorem*, BLACK'S LAW DICTIONARY (9th ed. 2009).
8. *See supra* note 6.
9. *See supra* note 6.

provided herein as if such person had predeceased me leaving no descendants surviving me."[10]

If the contest is successful, the will is thrown out (and the clause with it), and the beneficiary receives a greater share of property through intestacy or under a prior will under which the contestant may receive a more favorable bequest.[11] If the contest is unsuccessful, the will or trust stands, and the beneficiary forfeits what the beneficiary would have otherwise received under the instrument.[12]

II. BECAUSE OF THEIR HARSHNESS, *IN TERROREM* PROVISIONS ARE STRICTLY CONSTRUED

Because of the potentially harsh result of the application of an *in terrorem* clause, Texas courts traditionally strictly construed the clauses and found a violation only if the contestant's conduct fell plainly within the terms of the clause.[13] Texas courts narrowly construe *in terrorem* clauses to avoid forfeiture, while at the same time attempting to honor the testator's wishes as expressed in the will.[14]

III. TEXAS COURTS HINTED AT THE EXISTENCE OF A PROBABLE CAUSE EXCEPTION TO THE APPLICATION OF AN *IN TERROREM* CLAUSE

To avoid the application of an *in terrorem* clause, some courts began to hint at the existence of a "probable cause" or "good faith" exception to the application of the clause.[15] In *Calvery*, the adopted daughter of Mrs. Calvery brought a declaratory judgment suit to construe Calvery's will.[16] She contended the will left her title to certain real property in fee simple.[17] The will devised to her a life estate with remainder to the heirs of Plaintiff's body after her death.[18] It then provided that "any effort to vary the purpose and intention of this item expressed shall revoke and annul any bequest to her."[19] Following Mrs. Calvery's death, Plaintiff used the land she argued was

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10. *See* 2 Ronald R. Cresswell, *Texas Practice Guide Wills, Trusts, & Estate Planning* § 5.527 (2016).
11. *See* Gerry W. Beyer, Rob G. Dickerson, & Kenneth L. Wake, *The Fine Art of Intimidating Disgruntled Beneficiaries With In Terrorem Clauses*, 51 SMU L. REV. 225, 227 (1998).
12. *Id.*
13. *See, e.g.*, *In re* Estate of Hodges, 725 S.W.2d 265, 268 (Tex. App.—Amarillo 1986, writ ref'd n.r.e.); Sheffield v. Scott, 662 S.W.2d 674, 676 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.).
14. Estate of Newbill, 781 S.W.2d 727, 728 (Tex. App.—Amarillo 1989, no writ).
15. Calvery v. Calvery, 55 S.W.2d 527 (Tex. Comm'n App. 1932, judgm't adopted).
16. *Id.* at 528.
17. *Id.*
18. *Id.*
19. *Id.*

conveyed to her in order to secure a loan.[20] Mrs. Calvery's heirs argued that Plaintiff was the recipient of a life estate, and that by purporting to convey a fee simple interest the Plaintiff had triggered the no-contest clause.[21] Plaintiff filed a declaratory judgment action to determine if she was entitled to a life estate or a fee simple interest in the real property.[22] The heirs argued that the declaratory judgment action itself also triggered the no-contest clause.[23] The Plaintiff's intent was to determine the proper construction of the will because the proper application of the rule in Shelly's case created a question of ownership.[24] The court said a suit to *construe* a will is not a contest.[25] The court noted that the great weight of authority supports a good faith rule, stating that it would not enforce a forfeiture clause where the contest is made in good faith and upon probable cause.[26] However, the court concluded it did "not intend to declare whether a forfeiture would result from a suit merely to ascertain the intent of a testator, regardless of the contestant's good faith and regardless of the existence of probable cause for the institution of the suit," because "[n]o such case is before us."[27]

In spite of the court insisting that it was not adopting a good faith exception, other courts appear to have used the language in *Calvery* as evidence that Texas would likely adopt the probable cause exception when a plaintiff ultimately presents such a case.[28] After *Calvery*, *First Methodist Episcopal Church South v. Anderson* was the first case to acknowledge a possible good faith exception.[29] The court did not address the issue, however, because the suit was brought to determine the extent of the beneficiary's bequest and, therefore, was not a contest.[30] However, the court implied that because the parties brought the action upon probable cause, that it was beyond the scope of the forfeiture provision.[31] The court pointed out that Texas courts have "recognized the right of a testator to provide that any object of his bounty who is not satisfied to let the directions of his will be performed shall be disinherited."[32] The court went on to state that, "[h]owever, the great weight of authorities sustain the rule that a forfeiture of rights under the terms of a will will not be enforced where the contest of the will is made in good

20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 529.
25. *Id.* at 530.
26. *Id.*
27. *Id.* at 530–31.
28. First Methodist Episcopal Church South v. Anderson, 110 S.W.2d 1177 (Tex. Civ. App.—Dallas 1937, writ dismissed).
29. *Id.*
30. *Id.* at 1184.
31. *Id.*
32. *Id.*

faith and upon probable cause."[33] In view of the strictness of the rule against declaring forfeitures, the court stated that "we do not think a suit brought in good faith and upon probable cause to ascertain the intention of the testator, the extent of his devise and, then, in turn, enforce its terms in accordance therewith, should be considered as an effort to vary the purpose and intention of the will."[34]

Later, in *Hodge v. Ellis*, a surviving spouse filed a trespass-to-try-title suit to protect his interest in property devised under the will because, although the surviving spouse held the property in the deceased wife's name, the surviving spouse and his then living wife purchased the property with community funds.[35] The will provided for a forfeiture of rights by any person taking under the will who in any manner contested or questioned the will or any clause thereof in any judicial proceeding.[36] Relying on *Calvery* and *First Methodist*, the court in *Hodge* found that the suit was initiated in good faith and upon probable cause and, therefore, did not constitute grounds for forfeiture.[37] Because of the act of the deceased wife in purportedly devising all of the property as her separate property rather than confining her devise to the interest that belonged to her, the court noted that the surviving spouse found it necessary to file the trespass to try title suit to protect his community interest in the property.[38] Citing *Calvery*, the court concluded that because no party established the issue of bad faith, that the trespass-to-try-title suit was instituted in good faith and upon probable cause.[39] Relying upon reasoning similar to that in *First Methodist*, the court distinguished the suit from an action brought to thwart the testator's desires as stated in the will.[40] Had the surviving spouse made such attempt, the forfeiture provision would be operative.[41]

IV. MANY COURTS FOUND A WAY AROUND THE APPLICABILITY OF THE CLAUSE ALTOGETHER

Professor Gerry Beyer makes an important observation about this line of cases.[42] He notes that even though the *First Methodist* and *Hodge* courts' decisions admitted that probable cause was not at issue, neither decision correctly portrayed the application of the probate cause exception

33. *Id.*
34. *Id.* (emphasis added).
35. Hodge v. Ellis, 268 S.W.2d 275 (Tex. App.—Fort Worth 1954).
36. *Id.* at 279.
37. *Id.* at 287.
38. *Id.*
39. Calvery v. Calvery, 55 S.W.2d 527 (Tex. Comm'n App. 1932, judgm't adopted).
40. *Id.*
41. *Id.*
42. *See* Gerry W. Beyer, Rob G. Dickinson, & Kenneth L. Wake, *The Fine Art of Intimidating Disgruntled Beneficiaries with in Terrorem Clauses*, 51 S.M.U. LAW REVIEW 225 (1998).

principles.[43] Beyer continues by explaining that, "[t]o properly apply the probable cause exception the beneficiary's suit must initially be categorized as a 'contest,'" or in other words; a suit raised to challenge the testator's intent.[44] If a contest suit is established, the court must demonstrate not only that the beneficiary brought the action in good faith, but also that he had probable cause for doing so; otherwise, forfeiture must occur.[45] Thus, Beyer warns that these holdings were not really "an indication that the courts declined to permit forfeitures because of the existence of probable cause."[46] Rather, according to Beyer, these holdings reveal that the courts found that the beneficiary's action to discern the testator's intent was not within the scope of a contest suit, placing it "beyond the purview of the forfeiture provision in the first place."[47]

To circumvent the applicability of the *in terrorem* clause, numerous courts found the contestant's conduct was simply not violative of the *in terrorem* clause at issue.[48]

A. Overview of Case Law

The following is a summary of actions courts have held the contestant can take without violating the *in terrorem* clause, assuming there is no direct violation of the clause:

- Request an Accounting or Partition,[49]
- Enter a Family Settlement Agreement or File a Declaratory Judgment to Determine Whether a Family Settlement Agreement Causes Forfeiture,[50]
- Challenge the Appointment of An Executor,[51]
- Sue an Executor for Breach of Fiduciary Duty,[52]

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43. *Id.* at 252.
44. *Id.* at 252–53.
45. *Id.* at 253.
46. *Id.*
47. *Id.*
48. *See infra* Section VI.A.
49. *See* Estate of Minnick, 653 S.W.2d 503 (Tex. App.—Amarillo 1983, no writ) (finding that section 149B of the Texas Probate Code authorized courts to order an "independent administrator to make a partial or complete distribution" of the property); Bethurum v. Browder, 216 S.W.2d 992, 995 (Tex. App.—El Paso 1948, writ ref'd n.r.e.) (property partitioned in-kind after executor failed to act); Upham v. Upham, 200 S.W.2d 880, 883 (Tex. App.—Eastland 1947, writ ref'd n.r.e.) (finding that action brought regarding the division under the will was not a contest, so the no-contest provision was not enacted).
50. *See* Estate of Hodges, 725 S.W.2d 265, 268 (Tex. App.—Amarillo 1986, writ ref'd n.r.e) (holding that family settlement agreement was enforceable because property belonged to beneficiaries, and will was entered only as a muniment of title).
51. *See* Estate of Newbill, 781 S.W.2d 727, 727 (Tex. App.—Amarillo 1989, no writ) (absent an express provision prohibiting challenges to the executor, challenges to the executor's suitability did not fall within the no-contest provision).
52. *See* McLendon v. McLendon, 862 S.W.2d 662, 670 (Tex. App.—Dallas 1993, writ denied) (action for mismanagement of estate assets and for breach of fiduciary duty not prevented by no-contest provision).

- Sue to Remove a Co-Trustee,[53]
- Testify in Support of a Contest,[54]
- File Alternative Wills for Probate,[55]
- File a Later Will Revoking a Prior Will Containing an *In Terrorem* Clause,[56]
- File Alleged Holographic Codicils Even if Codicils Are Found to Be Invalid,[57]
- Sue a Beneficiary to Enforce a Judgment,[58]
- Determine the Proper Characterization of Property or Ascertain One's Interest Under the Will,[59]
- Challenge an Inventory,[60]
- Force the Executor to Perform His Duties,[61]
- Recover Damages for the Conversion of Assets That Were Devised or Bequeathed to a Contesting Beneficiary,[62]
- Contest a Deed That Conveyed a Beneficiary's Interest Under the Will,[63]

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53. *See* Conte v. Conte, 56 S.W.3d 830, 832 (Tex. App.—Houston [1st Dist.] 2001, no writ) (action to remove a trustee was not included in the language of the *in terrorem* clause, so it was allowed by the court).

54. *See* Hazen v. Cooper, 786 S.W.2d 519, 520–21 (Tex. App.—Houston [14th Dist.] 1990, no writ) (holding that an appearance at a will contest proceeding was insufficient to trigger the no-contest clause and that any truthful testimony would not constitute aid to the will contest).

55. *See* Estate of Foster, 3 S.W.3d 49, 52 (Tex. App.—Amarillo 1999, no writ) (finding that merely seeking probate of a second will did not constitute a contest to the first will).

56. *See* Cason v. Taylor, 51 S.W.3d 397, 403–13 (Tex. App.—Waco 2001, no pet.) (holding that when there is sufficient evidence to prove that a holographic will existed and revoked the prior will, seeking to admit the holographic will did not violate *in terrorem* clause).

57. *See* In Re Estate of Schiwetz, 102 S.W.3d 355, 367 (Tex. App.—Corpus Christi 2003, pet. denied) (holding that alleged codicils admitted to determine testator's intent were not a contest to the will).

58. *See* Badouh v. Hale, 22 S.W.3d 392, 397 (Tex. 2000) (finding that acts not expressly prohibited by the *in terrorem* provision do not violate the clause).

59. *See* Reed v. Reed, 569 S.W.2d 645, 648 (Tex. App.—Dallas 1978, writ ref'd n.r.e.) (holding that action filed to determine testator's intent not a contest to the will); Roberts v. Chisum, 238 S.W.2d 822, 825 (Tex. App.—Eastland 1951, no writ) (holding that simply seeking to construe the will did not constitute a contest triggering the *in terrorem* provision); Upham v. Upham, 200 S.W.2d 880, 885 (Tex. App.—Eastland 1947, writ ref'd n.r.e.) (finding that simply seeking a construction or enforcement of a will shall not violate a no-contest clause).

60. *See* Ferguson v. Ferguson, 111 S.W.3d 589, 599 (Tex. App.—Fort Worth 2003, pet. denied) (finding that inventory challenge was not a contest because such an action was not expressly prohibited by the language of the provision).

61. *See* Bethurum v. Browder, 216 S.W.2d 992, 995–96 (Tex. App.—El Paso 1948, writ ref'd n.r.e.) (holding that requiring the executor to perform his duties and act with utmost good faith is not a violation of an *in terrorem* clause).

62. *See* Dulak v. Dulak, 496 S.W.2d 776, 781–82 (Tex. App.—Austin 1973), *aff'd in part, rev'd in part*, 513 S.W.2d 205 (Tex. 1974) (suit for wrongful retention of assets was not a challenge to the will).

63. *See* Veltmann v. Damon, 696 S.W.2d 241, 246 (Tex. App.—San Antonio 1985), *aff'd in part, rev'd in part on other grounds*, 701 S.W.2d (Tex. 1985) (suit regarding the power to make conveyances did not trigger no-contest clause).

- Apply for Authority to Make Tax-Motivated Gifts,[64]
- Oppose the Payment of a Debt by the Executor.[65]

V. ONE TRIAL COURT STUCK ITS NECK OUT AND APPLIED A GOOD FAITH/PROBABLE CAUSE EXCEPTION

While the appellate court did not hear the issue, one trial court applied a good faith and probable cause exception.[66] In *Paul v. Merrill Lynch Trust Co.*, Merrill Lynch, serving as executor, concluded that the Decedent's surviving spouse was entitled to specific items of personal property and that his adult children from a previous marriage were entitled to other property.[67] The adult children sued Merrill Lynch, claiming that the wife was not entitled to any of the Decedent's personal property because his will revoked his marital agreement.[68] The children sought Merrill Lynch's removal, disgorgement of its executor's fees, actual damages, exemplary damages, and attorneys' fees.[69] Merrill Lynch counterclaimed for declaratory judgment on certain issues, for the imposition of a constructive trust on any property improperly disposed of, and for attorneys' fees.[70] Merrill Lynch also alleged that the children violated the *in terrorem* clause in the will.[71] The trial court ruled against the children on their claim for damages, changed Merrill Lynch's determination as to certain property, and rejected the children's claim to remove the executor and to disgorge it of its fee.[72] The trial court ruled in favor of Merrill Lynch on its claim that the children violated the *in terrorem* clause, but found that the children acted in good faith and with probable cause and that they did not forfeit their bequests to them in the will.[73] *Merrill Lynch did not appeal that part of the court's ruling*.[74] Therefore, the court of appeals did not have the opportunity to address whether Texas recognized a good faith exception to the applicability of an *in terrorem* clause.[75]

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64. *See* DiPortanova v. Monroe, 229 S.W.3d 324, 332-33 (Tex. App.—Houston [1st Dist.] 2006, pet. denied) (finding that *in terrorem* provision is not violated by actions seeking to modify, vary, set aside, or nullify the terms of the will).

65. *See* Estate of Hamill, 866 S.W.2d 339, 343 (Tex. App.—Amarillo 1993, no writ) (finding that objection to the payment of a debt was not a will contest, courts should strictly construe the language of the *in terrorem* clause and should avoid forfeiture when possible).

66. Paul v. Merrill Lynch Tr. Co., 183 S.W.3d 805, 810 (Tex. App.—Waco 2005, no pet.).

67. *Id.* at 808.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 809.

72. *Id.* at 810.

73. *Id.*

74. *Id.*

75. *See id.* at 810–11.

VI. COURTS IN SOME OTHER STATES EMBRACED THE PROBABLE CAUSE EXCEPTION TO THE APPLICATION OF THE NO-CONTEST CLAUSE

Courts in other states embraced the existence of a probable cause exception to the application of the no-contest clause to a will contest.[76] The Supreme Court of North Carolina succinctly summarized the reasoning why the door should be left open to challenging a will under certain circumstances without losing any benefits thereunder, stating:

> In our opinion, a *bona fide inquiry* whether a will was procured through fraud or undue influence, should not be stifled by any prohibition contained in the instrument itself. In fact, our courts should be as accessible for those who *in good faith* and upon *probable cause* seek to have the genuineness of a purported will determined, as they are to those who seek to find out the intent of a testator in a will whose genuineness is not questioned. Forfeiture clauses are usually included in wills to prevent *vexatious* litigation, but we should not permit such provisions to oust the supervisory power of the courts over such conditions and to control them within their legitimate sphere. There is a very great difference between vexatious litigation instituted by a disappointed heir, next of kin, legatee or devisee, without probable cause, and litigation instituted in good faith and with probable cause, which leads the contestant to believe that a purported will is not in fact the will of the purported testator. We think it is better to rely upon our trial courts to ascertain the facts in this respect. [77]

Some years before *Ryan*, the Supreme Court of Tennessee weighed in on the issue, stating:

> The better rule, however, seems to us to be that the penalty of forfeiture of the gift or devise ought not to be imposed when it *clearly appears* that the contest to have the will set aside was *justified under the circumstances*, and was not a mere vexatious act of a disappointed child or next of kin. A different rule—an unbending one—that in no case shall an unsuccessful contestant of a will escape the penalty of forfeiture of the interest given him, would sometimes not only work manifest injustice, but accomplish results that no rational testator would ever contemplate. . . . He who will take advantage of his power to unduly influence another in the execution of a will artfully have a care to have inserted in it a clause to shut off all inquiry as to the influence which really made the will; and, if the rule invoked by the appellants is to be applied with no case excepted from it, those who unscrupulously play upon the feelings of the testator may, with impunity,

76. *See infra* notes 385–413.

77. Ryan v. Wachovia Bank & Tr. Co., 70 S.E.2d 853, 856–57 (N.C. 1952) (emphasis added) (citation omitted).

> enjoy the fruits of their iniquity, and laugh in scorn at those whom they have wronged.[78]

As can be seen from these referenced quotes, rather than find a creative way around the applicability of an *in terrorem* clause, other states began to embrace the idea that a contest of will, even if unsuccessful, may have, in fact, been based on probable cause or brought in good faith.[79] The key determination is whether the challenge is vexatious or based upon facts which cause legitimate concern regarding the circumstances surrounding the execution of the will.[80]

VII. STATUTORY PROBABLE CAUSE EXCEPTIONS

In 1983, the American Law Institute adopted Section 9.1 of the Restatement of Property (Second), which provides:

> An otherwise effective provision in a will or other donative transfer, which is designed to prevent the acquisition or retention of an interest in property in the event there is a contest of the validity of the document transferring the interest or an attack on a particular provision of the document, is valid, *unless there was probable cause for making the contest or attack*.[81]

In 1998, similar language was adopted in the Uniform Probate Code, providing: "A provision in a will purporting to penalize any interested person for contesting the will or instituting other proceedings relating to the estate is *unenforceable if probable cause exists for instituting proceedings*."[82]

Twenty-two states have adopted the UPC rule or a similar "probable cause" rule.[83]

In 2003, Restatement Third of Property promulgated Section 8.5 which provides: "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.*"[84]

Finally, in 2009, the Texas Legislature amended what was then Section 64 of the Texas Probate Code to state a no-contest clause will not cause a beneficiary to lose his gift if the contesting party had both (1) probable cause for bringing the action and (2) was in good faith in bringing and maintaining

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78. Tate v. Camp, 245 S.W. 839, 843 (Tenn. 1922) (emphasis added).
79. *See infra* notes 95–103.
80. *See infra* notes 95–103.
81. RESTATEMENT (SECOND) OF PROP.: WILLS AND DONATIVE TRANSFERS § 9.1 (AM. LAW INST. 1983) (emphasis added).
82. UNIF. PROB. CODE §§ 2-517, 3-905 (West 2017) (emphasis added).
83. *See infra* notes 385–413.
84. RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 8.5 (AM. LAW INST. 2003) (emphasis added).

the action.[85] In 2011, the Legislature replaced the phrase "probable cause" with "just cause."[86] In 2013, the Legislature addressed the burden of proof, placing the burden on the party contesting the will to establish by a preponderance of the evidence that "(1) just cause existed for bringing the action and (2) the action was brought and maintained in good faith."[87] In 2015, the Legislature added a new section addressing claims of breach of fiduciary duty or seeking construction of a will.[88]

Section 254.005 of the Texas Estates Code currently provides as follows:

> (a) A provision in a will that would cause a forfeiture of or void a devise or provision in favor of a person for bringing any court action, including contesting a will, is enforceable unless in a court action determining whether the forfeiture clause should be enforced, the person who brought the action contrary to the forfeiture clause establishes by a preponderance of the evidence that:
> (1) just cause existed for bringing the action; and
> (2) the action was brought and maintained in good faith.
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> (b) This section is not intended to and does not repeal any law recognizing that forfeiture clauses generally will not be construed to prevent a beneficiary from seeking to compel a fiduciary to perform the fiduciary's duties, seeking redress against a fiduciary for a breach of the fiduciary's duties, or seeking a judicial construction of a will or trust.[89]

In 2009, the Legislature also passed Section 112.038 of the Texas Property Code which is similar to the referenced section but made the good faith exception applicable to trusts.[90] That section currently provides as follows:

> (a) A provision in a trust that would cause a forfeiture of or void an interest for bringing any court action, including contesting a trust, is enforceable unless in a court action determining whether the forfeiture clause should be enforced, the person who brought the action contrary to the forfeiture clause establishes by a preponderance of the evidence that:
> (1) just cause existed for bringing the action; and
> (2) the action was brought and maintained in good faith.

85. *See* TEX. PROB. CODE ANN. § 64 (West 2014), repealed by TEX. EST. CODE ANN. § 254.005 (West 2015).
86. *Id.*
87. TEX. EST. CODE ANN. § 254.005 (West 2013).
88. *Id.*
89. TEX. EST. CODE ANN. § 254.005 (West 2015).
90. TEX. PROP. CODE ANN. § 112.038 (West 2017).

(b) This section is not intended to and does not repeal any law, recognizing that forfeiture clauses generally will not be construed to prevent a beneficiary from seeking to compel a fiduciary to perform the fiduciary's duties, seeking redress against a fiduciary for a breach of the fiduciary's duties, or seeking a judicial construction of a will or trust.[91]

VIII. TEXAS COURTS HAVE OFFERED LITTLE GUIDANCE AS TO WHAT CONSTITUTES GOOD FAITH AND JUST CAUSE

Whether the enactment of the referenced statutes codified existing Texas law, prior cases provide little guidance about what facts are relevant in determining if a contest was brought in good faith and with just cause.[92] Texas jurisprudence has consisted mainly of a series of cases, some of which were cited above, which found a way around the applicability of the *in terrorem* clause by stating certain conduct did not fall within the terms of the clause.[93] Even following the formal enactment of the good faith exception, neither the Texas courts nor the legislation have provided much guidance in defining what constitutes good faith and just cause.[94]

In *Estate of Cole*, for example, Robert Cole Sr. left a will dividing his estate between three beneficiaries: his wife Judith, his daughter Karen, and his son Robert Cole Jr.[95] In his will, Robert Sr. specified his intention to "dispose of all my property, real, personal, and mixed, including my one-half interest in the community property of myself and my wife [Judith]."[96] The will featured a forfeiture clause providing that should the will be contested by any beneficiary "in any manner, including but not limited to the characterization of my property as my separate property," the bequest under the will to that beneficiary would be revoked.[97]

Judith sought to obtain reimbursement for alleged capital improvements to the homestead and for her community portion of an investment account.[98] Karen objected to Judith's application and filed a counterclaim requesting a declaratory judgment to determine whether or not the will put Judith to an election.[99] Karen further argued that the forfeiture clause applied to Judith's

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91. *Id.*
92. *See supra* Part VI.A.
93. *See supra* Part VI.A.
94. *See, e.g.*, Estate of Cole, No. 02–13–00417–CV, 2015 WL 392230, at *1 (Tex. App.—Fort Worth 2015, no pet.); Estate of Boylan, No. 02–14–00170–CV, 2015 WL 598531, at *1 (Tex. App.—Fort Worth 2015, no pet.).
95. Estate of Cole, No. 02–13–00417–CV, 2015 WL 392230, at *1 (Tex. App.—Fort Worth 2015, no pet.).
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.* at *2.

action.[100] In response, Judith argued that because "any proceeding taken was done with just cause and the action maintained in good faith" she did not forfeit her right to take under the will by virtue of the forfeiture clause.[101] The jury found, in relevant part, Judith did not act in good faith and with probable cause in bringing her action.[102]

On appeal, the court stated that there must necessarily be a contest contrary to the forfeiture clause before it can address issues of good faith and probable cause.[103] Whether a contesting party triggers the forfeiture clause—in other words, "whether the contesting party's actions fall within the terms of the forfeiture clause"—is a question of law.[104] "A breach of a forfeiture clause will be found only where the acts of a beneficiary or devisee fall within the express terms."[105] The court of appeals found that the trial court confused the issue of whether the will put Judith to an election and whether the forfeiture clause was triggered by Judith's community-property claim on the investment account.[106] The trial court did not submit the issue of whether Judith's action was a contest and "seemed to assume that the forfeiture clause was triggered by the presence of an election in the will."[107] The court did, however, submit Judith's affirmative defense to the application of the forfeiture clause.[108] The court ultimately concluded the trial court erred in submitting the affirmative defense to the jury.[109] Without a predicate conclusion that Judith's community-property claim on the investment account was a contest as defined in the forfeiture clause, Judith's affirmative defense of good faith and just cause was not implicated.[110] *Estate of Cole* merely affirms Professor Beyer's aforementioned assertion that there must first be conduct falling within the prohibition of the forfeiture clause at issue before the question of the contesting party's good faith becomes an issue.[111] Therefore, *Estate of Cole* is just one example in a long line of cases that describing conduct not violative of a forfeiture clause without offering guidance on what constitutes good faith and just cause.[112]

100. *Id*.
101. *Id.*
102. *Id.*
103. *Id.* at *8.
104. *Id.*
105. *Id*. at *2 (citing Ferguson v. Ferguson, 111 S.W.3d 589, 599 (Tex. App.—Fort Worth 2003)).
106. Estate of Cole, No. 02–13–00417–CV, 2015 WL 392230, at *1, *2 (Tex. App.—Fort Worth 2015, no pet.).
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *See* Beyer, *supra* note 42, at 252.
112. *See supra* Part IV.A.

In *Estate of Boylan*, the late Maurice Boylan left a will naming his son, Cooper, as executor of his estate.[113] The will bequeathed one bank account to Cooper and Lonnie, Maurice's only other child.[114] Another bank account went to Cooper, Lonnie, and their respective children.[115] Cooper also received most of the residuary estate. Boylan's will contained an *in terrorem* clause which stated:

> "If any beneficiary under this Will shall in any manner contest or attack this Will or any of its provisions, any share or interest in my estate given to such contesting beneficiary under this Will is hereby revoked and shall be disposed of as part of the residue of my estate."[116]

After probating the will, Lonnie opposed, claiming that "Maurice lacked the testamentary capacity necessary to effectuate the distribution of his assets in accordance with his independent wishes and desires."[117] Following discovery, Lonnie's attorney advised Lonnie against further contest of Maurice's will, "especially since doing so could result in forfeiting that portion of [Maurice's] estate left to [Lonnie]."[118] Lonnie dismissed his contest accordingly.[119]

Believing Lonnie forfeited his inheritance by violating the *in terrorem* clause, Cooper distributed the estate without giving anything to Lonnie.[120] In response, Lonnie sought an accounting, distribution of the assets, and closure of the estate.[121] Lonnie also sued Cooper for breach of fiduciary duty and sought a declaratory judgment that he had not forfeited his interest in the estate.[122] The trial court determined that Lonnie's contest did not violate the *in terrorem* clause.[123] The court additionally found that Cooper had not breached his fiduciary duty as executor but nonetheless "awarded Lonnie the amounts devised to him in the will to be recovered from Cooper 'in his capacity as executor' only."[124] Lonnie then sought to include recovery

113. Estate of Boylan, No. 02–14–00170–CV, 2015 WL 598531, at *1 (Tex. App.—Fort Worth 2015, no pet.).
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id*.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id*.
124. *Id.*

against Cooper in the judgment, but the court denied the motion.[125] Lonnie and Cooper both appealed.[126]

On appeal, the court pointed to the well-established proposition that *in terrorem* clauses are narrowly construed to avoid forfeiture wherever possible.[127] Thus, "courts have enforced *in terrorem* clauses only when the intention of a suit is to thwart the grantor's intention."[128] The court also referenced Texas's adoption of the good faith and just cause defense.[129]

At trial, Lonnie testified that he filed his opposition "to find out if [Cooper] was lying to [him] and to find out exactly what [Maurice] intended for [him] to inherit."[130] Cooper refuted the statement by arguing that "Lonnie could not have filed his action in good faith because he had not seen a copy of the will before filing."[131] The court recognized "there is much undefined regarding what falls under the good faith exception" but, citing *Calvery*, pointed out that filing suit to determine a testator's intent or to ascertain a beneficiary's interest under a will is not a suit intended to dispute the validity of the will.[132] Rather, a motion to contest a will is "merely a pleading that is the necessary vehicle by which the movant raises issues for resolution."[133]

The court observed that finding "the mere filing of a motion to contest a will is, in and of itself, a contest of the will would be inconsistent with the legal significance of a motion." The court also stated that, until some further action is taken to thwart the testator's intention, the filing of a contest motion will not in itself cause a forfeiture under the *in terrorem* clause.[134] The court additionally noted that Lonnie had not been able to see the will before filing his contest and that, once he had seen the will and learned from witnesses that Maurice had been mentally competent up until his death, Lonnie dismissed his opposition.[135] Accordingly, the court held that the filing of the will contest and propounding discovery did not thwart the testator's intent.[136] The appellate court therefore upheld the trial court's determination that Lonnie did not violate the *in terrorem* clause or forfeit his inheritance.[137]

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125. *Id.*
126. *Id.*
127. *Id*. at *2.
128. *Id.*
129. *Id.* at *3.
130. *Id.*
131. *Id.*
132. *Id.* (citing Calvery v. Calvery, 55 S.W.2d 527, 530 (Tex. Comm'n App. 1932, judgm't adopted).
133. Estate of Boylan, No. 02–14–00170–CV, 2015 WL 598531, at *1, *2 (Tex. App.—Fort Worth 2015, no pet.).
134. *Id.*
135. *Id.* at *3 (citing Sheffield v. Scott, 662 S.W.2d 674, 667 (Tex. App.—Houston [14th Dist.] 1983 srit ref'd n.r.e.)).
136. Estate of Boylan, No. 02–14–00170–CV, 2015 WL 598531, at *1, *2 (Tex. App.—Fort Worth 2015, no pet.).
137. *Id.*

As with *Estate of Cole*, *Estate of Boylan* also failed to shed much light on the type of facts necessary to sustain a good faith and just cause defense to an allegation that the *in terrorem* clause was violated.[138] Like *Estate of Cole*, the court in *Estate of Boylan* focused on whether a contest to the will even occurred.[139] Therefore, neither decision addressed the question of the applicability of the good faith and just cause defense.[140] However, *Estate of Boylan* is instructive in drawing a clear distinction between *bringing* suit in good faith and *maintaining* suit in good faith, both of which Texas law requires, as discussed below.[141] The court said that once Lonnie learned he did not have a strong case, he dismissed it.[142] Therefore, he did not maintain the suit at all—much less in bad faith.[143]

In another case, *In Estate of Kam*, Carol Kam appealed a probate court's rejection of her statutory bill of review.[144] Kam asserted "the probate court should have granted her statutory bill of review because the court erred in the underlying litigation by finding," among other things, that she "failed to plead or prove her will contest was brought in good faith."[145] In the underlying will contest, Kam "sought to set aside the order probating her brother, Robert's, will because he purportedly lacked requisite testamentary capacity to execute the will or the will was the result of undue influence."[146] Kam also sought to contest her brother's amended trust, which contained a no-contest provision stating it does not apply when "a contest is brought and maintained in good faith, and probable cause exists for bringing the contest" and "the court in which a contest is brought shall determine if an action was brought and maintained in good faith and if probable cause existed."[147] The court's judgment stated, in part, that Kam failed to plead or to prove her contest was brought with probable cause or that it was brought and maintained in good faith. Respondents, on the other hand, both pleaded and proved that Kam brought and maintained the contest in bad faith and without probable cause, and consequently the no-contest provisions operate against Kam and all benefits to which she or her descendants would otherwise be entitled are revoked and shall pass as if Kam and her descendants had predeceased the Settlor.[148]

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138. *Id.*
139. *See infra* note 160.
140. *See infra* note 160.
141. *Estate of Boylan*, No. 02–14–00170–CV, 2015 WL 598531, at *1, *2 (Tex. App.—Fort Worth 2015, no pet.).
142. *Id.*
143. *See id.*
144. Estate of Kam, No. 05–16–00126–CV, 2016 WL 7473905, at *1 (Tex. App.—Dallas 2016, pet. denied).
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.* at *2.

On appeal, Kam requested the appellate court take judicial notice of documents that went "to the merits of the dispute by accessing the probate court's website and determining which documents filed in the probate court were germane to the will contest."[149] The court declined, stating that to do so would transform the appellate court to one of original jurisdiction.[150] Moreover, a complete clerk's record of the will contest case was not before the court, and Kam provided no information of the testimony and admitted no evidence at the trial.[151] Therefore, on that record, the court concluded "the probate court could reasonably have concluded [Kam] did not carry her burden to establish substantial error in the will contest judgment."[152] *Kam* does not go into any detail about the underlying facts which led the court to find she lacked good faith and just cause.[153]

Since the Texas courts have offered little assistance as to the facts or evidence required to show good faith and just cause, it is helpful to examine how other states with a longer history of the good faith and probable cause exception have addressed the issue.[154]

IX. WHAT CONSTITUTES PROBABLE CAUSE?

As previously mentioned, in 2011, the Texas Legislature replaced the phrase "probable cause" with "just cause."[155] Texas appears to be the only state employing the term "just cause" rather than "probable cause."[156] Most states which have a defense to the enforceability of a no-contest clause use the term "probable cause."[157] Since there has been little help so far from Texas courts or the legislature in defining what constitutes probable or just cause, practitioners should look to other authorities and jurisdictions to shed some light on the subject.[158]

The comments to Section 8.5 of the Restatement Third of Property provides some guidance as to what constitutes probable cause.[159] Comment C to Section 8.5 provides as follows:

> "Probable cause exists when, at the time of instituting the proceeding, there was evidence that would lead a *reasonable person*, properly informed and

149. *Id.* at *5.
150. *Id.* at *10.
151. *Id.*
152. *Id.*
153. *Id.*
154. *See supra* note 113.
155. *See supra* note 101.
156. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 8.5 (AM. LAW INST. 2001).
157. *Id.*
158. *See supra* note 113.
159. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 8.5 cmt. c (AM. LAW INST. 2001).

> 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. The mere fact that the person mounting the challenge was represented by counsel is not controlling, however, since the institution of a legal proceeding challenging a donative transfer normally involves representation by legal counsel.[160]

A. Cases Finding a Lack of Probable Cause

The following is an illustration from the Restatement Third of Property showing a contest lacking probable cause:

> G's will devises Blackacre to his son S. The will devises the residuary estate to G's daughter D. The will contains the following clause: "If any beneficiary under my will should directly or indirectly contest, oppose, or dispute this my last will and testament, I direct that such beneficiary shall receive nothing under my will." The residuary gift to D is three times as valuable as Blackacre. S contests the will on the ground of undue influence on G by D. S is unsuccessful in this contest. The only basis for S's claim of undue influence was the inequality of treatment as revealed by what he received as compared with what D received. The conclusion is justified that there was no probable cause for the contest. S receives nothing under the will. Blackacre passes as a part of the residue to D.[161]

The South Carolina Supreme Court offers a more detailed example.[162] In *Russell v. Wachovia Bank*, the testator "amended his will and revocable trust to include language explicitly providing that beneficiaries who contested the validity of the estate plan would have their interest revoked and shall be deemed to have predeceased [him.]"[163] The court found the testator "maintained his physical and mental health up until his death."[164] He was fully able to execute documents.[165] He continued to drive himself to and from work, maintaining his responsibilities as a federal judge.[166] He was also independent, and went to and from his home and office, visiting friends, relatives, and business partners without supervision.[167] Evidence showed that the Testator "anticipated that certain beneficiaries would contest the validity

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160. *Id.*
161. RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 8.5 cmt. c, illus.1 (AM. LAW INST. 2001).
162. Russell v. Wachovia Bank, N.A., 633 S.E.2d 722, 727–28 (S.C. 2006).
163. *Id.*
164. *Id.*
165. *Id.* at 728.
166. *Id.*
167. *Id.*

of his estate plan."[168] He told his attorney and one of his children that he anticipated a challenge.[169] He even had himself "examined by a psychiatrist to create a record of his testamentary capacity."[170] The court stated that the testator "did all that he could have to ensure that his wishes would be respected."[171] The court emphasized that "[f]amily discord and strife, coupled with a less-than-favorable inheritance, [does] not constitute probable cause."[172] The court concluded: "If a no-contest clause cannot be upheld under these facts, such a clause would not ever be enforceable."[173]

In re Shaheen Trust, an Arizona case, sheds further light on what constitutes a lack of probable cause.[174] In that case, Catherine Pearl Roberts and her son, George Roberts, sued Twinkle Shaheen, the trustee, for breach of fiduciary duty.[175] The trust contained a no-contest clause.[176] Twinkle prevailed in the suit.[177] Twinkle then requested the court apply the no-contest clause, which the trial court refused to do.[178] Twinkle appealed the trial court's failure to apply the no-contest clause to the suit.[179] Even though the Arizona statute was not applicable to trusts on its face, the court applied the Restatement and said there must be probable cause to each challenge.[180] The Roberts' brought multiple claims against Twinkle.[181] Therefore, *each claim* had to have been brought with probable cause.[182] Further, the contestant's subjective belief must be objectively reasonable.[183] One claim was that Twinkle could only take yearly distributions, not monthly distributions.[184] This argument was contrary to the provisions in the trust.[185] Therefore, the claim was not reasonable and was without probable cause.[186] The forfeiture clause should have been enforced.[187]

In *Seymour v. Biehslich*, after the trial court denied a testator's daughter's petition to probate a second will, the testator's personal representative moved to exclude the testator's daughter from the distribution

168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.* at 727.
173. *Id.* at 728.
174. *In re* Shaheen Trust, 341 P.3d 1169, 1170 (Ariz. Ct. App. 2015).
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.* at 1171.
179. *Id.*
180. *Id.* at 1171–72.
181. *Id.* at 1172.
182. *Id.* (emphasis added).
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.* at 1172–73.
187. *Id.* at 1173.

under testator's will pursuant to a no-contest clause.[188] The trial court granted the motion.[189] The appellate court affirmed the trial court's decision, holding that there was ample evidence that testator's daughter was not acting in good faith when she procured the second will and offered it for probate, and thus, her actions triggered the no-contest clause.[190] The court pointed out that the second will was in the daughter's handwriting, was signed only with an "X" rather than the testator's usual signature, and bequeathed nearly the entire estate to daughter, leaving only $1,000 to be divided among the other heirs.[191]

B. Cases Finding the Existence of Probable Cause

The following is an illustration from the Restatement (Third) of Property of a contest brought with probable cause:

> G's will devises half of his property to the person who served as his nurse during the last three years of his life. His will devises the other half of his property to his only son. The will was made one year before G died. During the last three years of G's life, he was mentally incompetent most of the time but did have some lucid intervals. The will contained a provision that, if his son contested the will or any provision thereof, all of the property subject to disposition by G's will would go to the nurse. The son contested the will on the ground that his father did not have the mental capacity to make a will. His contest failed because it was determined that the will was executed during a lucid interval of his father. The conclusion is justified that there was probable cause for the contest and thus the son's interest under the will is not rescinded.[192]

A case from the Arizona Supreme Court, *In re Estate of Shumway*, is also instructive on what constitutes "probable cause" to bring a will contest.[193] In that case, at the request of his caregiver, the testator prepared and executed a will six days before his death.[194] The will gave the caregiver 25% of the estate.[195] The caregiver was also an agent under power of attorney at the time.[196] Not surprising, the will contained an *in terrorem* clause.[197] The testator's family contested the will claiming undue influence.[198] The family relied upon the presumption of undue influence which arises in the event of

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188. Seymour v. Biehslich, 266 S.W.3d 722, 724 (Ark. 2007).
189. *Id.*
190. *Id.* at 727.
191. *Id.*
192. RESTATEMENT (THIRD) OF PROP.: WILLS & DONATIVE TRANSFERS § 8.5 cmt. c, illus. 4 (AM. LAW INST. 2003).
193. *In re* Estate of Shumway, 9 P.3d 1062 (Ariz. 2000).
194. *Id.* at 1064.
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.*

a confidential relationship.[199] Regardless, the trial court probated the will and enforced the *in terrorem* clause.[200] The court of appeals affirmed.[201]

The Arizona legislature based its statute on Uniform Probate Code 2-517, which provides the *in terrorem* clause is unenforceable if probable cause existed to contest the will.[202] The sole question on appeal was whether the presumption of undue influence was sufficient to constitute probable cause.[203] The court pointed out the law supports honoring the testator's intent.[204] On the one hand, forfeiture clauses preserve the testator's intent, avoid wasting the estate in litigation, and avoid the use of a will contest to obtain a more favorable settlement.[205] On the other hand, there should be access to the courts to prevent the probate of wills procured by fraud, undue influence, lack of capacity, faulty execution, and revocation.[206] Citing the Restatement, the court defined probable cause as "the existence, at the time of the initiating of the proceeding, of evidence which would lead a reasonable person, properly informed and advised, to conclude there is a substantial likelihood that the contest or attack will be successful."[207] The court noted that while good faith is part of the analysis, courts should also consider the subjective belief of the individual bringing the challenge.[208] The court should look at the evidence known at the time of filing.[209] This statute should be liberally construed when there is evidence of undue influence.[210]

The court then inventoried the evidence the contestants knew when they brought the contest:

- Testator's doctor stated testator had "marked deterioration" and was "waxing and waning" and clearly incompetent;
- The family's attorney advised them of the presumption of undue influence when there was a confidential relationship which could only be overcome with clear and convincing evidence;
- The will was signed in the hospital six days before the testator died;
- The *in terrorem* clause was likely already in the form;
- Testator was blind;

199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.* at 1065.
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.* at 1066.
208. *Id.*
209. *Id.* at 1067.
210. *Id.*

- Caregiver prepared the will;
- Caregiver was not in the previous will; and
- Witnesses to the will were the caregiver's relatives.[211]

Viewing that evidence, the court found probable cause existed to bring the contest.[212] Therefore, the clause was unenforceable in that instance.[213]

X. TEXAS' DUAL STANDARD OF GOOD FAITH AND JUST CAUSE

The referenced discussion sheds some light on what may or may not constitute probable cause for bringing a contest.[214] However, some states, including Texas require the contestant to act *both* with just (or probable) cause and good faith.[215] An Iowa case, *In re Estate of Workman*, discusses this dual standard.[216] The testator, Margaret Workman, executed multiple wills.[217] Her final will contained a no-contest clause that revoked the shares of a beneficiary who contested the will.[218] After Margaret's death, her son, Dennis, contested the will claiming that "(1) his mother lacked testamentary capacity and (2) his brother, Gary, exercised undue influence over her."[219] The court granted Gary summary judgment for the lack-of-testamentary-capacity claim, which left the undue-influence claim.[220] At trial, Gary motioned for a directed verdict, and the court denied.[221] The jury found in favor of Gary.[222] Gary then sought to revoke Dennis' share pursuant to the no-contest provision, which the court granted.[223]

Although the Iowa Legislature has incorporated some provisions of the Uniform Probate Code, it has not adopted section 2-517.[224] Therefore, the court inferred the legislature intended to retain the case precedent on the matter, which differed from the uniform probate code provision in one key aspect: the U.P.C. only renders the no-contest provision unenforceable if there is probable cause to contest the will.[225] Iowa common law, however, holds the provisions "will not be enforced against one who contests the will *in good faith and for probable cause*."[226] Even though there are two

211. *Id.* at 1067–68.
212. *Id.* at 1068.
213. *Id.*
214. *See infra* notes 215–237.
215. Di Portanova v. Monroe, 402 S.W.3d 711, 715 (Tex. App.—Houston [1st Dist.] 2012).
216. *See infra* note 241.
217. *In re* Estate of Workman, No. 16-0908, 2017 WL 706342, at *1 (Iowa App. 2017).
218. *Id.* at *1.
219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.* at *2.
225. *Id.*
226. *Id.* (citing *In re* Estate of Cocklin, 17 N.W.2d 129, 135 (Iowa 1945)) (emphasis added).

standards—good faith and probable cause—they have been applied interchangeably.[227] Persons have probable cause if they reasonably believe their claim is based on fact and therefore believe the claim may be valid, or so believed based on the advice of counsel.[228] One factor of probable cause is if the beneficiary relied on the advice of independent legal counsel in good faith after disclosing all facts.[229]

The good faith requirement examines the contestant's disclosure, the attorney's advice, and if the contestant acted on the advice.[230] The court should also consider if the contestant understood the testator's intentions, if the testator's conduct after the execution of the will was consistent with the testator's intentions, and if the testator was susceptible to suggestion because of their mental capacity.[231] Finally, the strength of the challenge is gauged by asking if a question was presented to the jury and how long the jury deliberated.[232] The final two factors depend on whether it is objectively reasonable that the challenger's subjective belief that the will contest is in good faith.[233] For example, if a challenger presents no evidence showing undue influence, their belief in the action when they filed the action could be deemed unreasonable.[234] Conversely, if the challenger introduced overwhelming evidence of undue influence, their belief could be deemed reasonable.[235] These factors demonstrate an objective good faith standard.[236]

With these definitions in mind, and recognizing the overlap of the probable cause and good-faith standards, the court looked at the facts of the case at bar.[237] The court stated mere advice of counsel is not in itself enough.[238] Dennis had to establish counsel advised him to bring the will contest action despite knowing about the no-contest provision.[239] Dennis provided no evidence that counsel advised him to file the contest action despite the no-contest provision.[240] Dennis testified he went forward with the action knowing he might get nothing, because he felt the will did not represent his mother's wishes."[241] However, he did not consult with any of

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227. *Id.* (citing Parker v. Benoist, 160 So.3d 198, 208 (Miss. 2015)) ("[M]any of the factors which support a finding of good faith support a finding of probable cause, and vice versa.").

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.* at *3.

234. *Id.*

235. *Id.*

236. *Id.* (citing Wilson v. Dallas, 743 S.E.2d 746, 760 (S.C. 2013) ("The question is not whether there was in fact undue influence, but whether the parties could in good faith reasonably believe so. . . . [S]omething more than a subjective belief or a mere allegation is necessary. . . .")).

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.* at *4.

241. *Id.*

his attorneys about the reasonableness of this belief.[242] While the evidence was not required to prove Dennis' claim, it was his burden to examine the good faith and probable cause factors of the no-contest provision.[243] Without such a showing, Gary's evidence regarding the no-contest provision stood unchallenged.[244]

Further, there was evidence Margaret had doubts regarding Dennis' financial stability and wished to protect her assets.[245] Her attorney testified that she was consistent in pursuing her estate plan.[246] Because her beliefs were consistent and her conduct conformed with her beliefs, Dennis had difficulty arguing his interpretation of her wishes was reasonable and that he had probable cause.[247] The denial of Gary's summary judgment said nothing regarding Dennis' belief of a valid claim was reasonable or if there was probable cause.[248] The district court stated, "I think Plaintiff's evidence is extremely thin but I think it is better for judicial economy in this case . . . to deny the motion for directed verdict and see what the jury does with it."[249] The jury deliberated for just over an hour.[250] "From the short deliberation period, a court could infer the jury saw Dennis' case as weak and Gary's case as supported by overwhelming evidence."[251] The court concluded Dennis did not establish probable cause and good faith.[252] Therefore, the no-contest provision was enforceable.[253]

The State of Nevada also follows a good faith and probable cause dual standard.[254] The relevant statute provides, in part:

> Notwithstanding any provision to the contrary in the will, a devisee's share must not be reduced or eliminated under a no-contest clause because the devisee institutes legal action seeking to invalidate a will if the legal action is instituted in good faith and based on probable cause that would have led a reasonable person, properly informed and advised, to conclude that the will is invalid.[255]

In *Hannam v. Brown*, the testator executed his contested will when he was eighty-two years old, after recently being hospitalized with hemiparesis

242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.* at *5.
246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.* at *6.
251. *Id.*
252. *Id.*
253. *Id.*
254. NEV. REV. STATE. ANN. § 137.005(4) (West 2017).
255. *Id.*

and aphasia.[256] At trial, the testator was shown on videotape incapable of verbal communication.[257] An attorney concluded that the testator lacked capacity, and removed the testator as the trustee for the family trust.[258] The attorney replaced the testator with the named successor trustee.[259] Despite the videotape, the district court when reviewing the case for lacking testamentary capacity, determined that the contestant failed to make a prima facie case that the testator lacked capacity at the time the will was executed.[266] The court did find that the contestant's challenge of testator's testamentary capacity was based on probable cause and in good faith.[260] On appeal, the court affirmed the holding of the district court.[261]

The state of Missouri has also addressed the good faith/probable cause dual standard.[262] In *Parker v. Benoist*, a father greatly depleted his estate to the benefit of one of his two children through a series of inter vivos gifts of money and real property.[263] An earlier will would have equally split the father's estate between the two children.[264] The second will in question did not significantly alter the distribution of the father's estate, but it did change the disposition of assets when combined with the inter vivos gifts from the father.[265] The benefitting child was found to have gained property that would not have received from the older will.[266] The contesting child was concerned about the father's actions considering the father's drug addiction and dementia.[267] The court concluded that the contesting child had met her burden of proof for bringing a will contest in good faith and based on probable cause.[268] The court noted that the contesting child had a reasonable expectation that the will contest would be successful with supporting evidence showing good faith.[269] The court further noted the contesting child had not brought the claim to be frivolous or cause vexatious litigation.[270] The contesting child brought 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."[271] There was no showing

256. *Id.*
257. Hannam v. Brown, 956 P.2d 794, 799 (Nev. 1998).
258. *Id.*
259. *Id.*
260. *Id.*
261. *Id.*
262. Parker v. Benoist, 160 So.3d 198, 206 (Miss. 2015).
263. *Id.*
264. *Id.*
265. *Id.* at 200.
266. *Id.*
267. *Id.*
268. *Id.* at 207.
269. *Id.* at 208.
270. *Id.*
271. *Id.*

of bad faith on the part of the contesting child.[272] The lower court reversed the ruling that the contesting child would receive nothing from the will based on the forfeiture clause.[273] The second will was ruled valid except for the forfeiture clause.[274]

XI. SUMMARY OF RELEVANT INQUIRIES AS TO WHETHER PROBABLE/JUST CAUSE EXISTS

Reviewing the various authorities cited above, the following is a list of inquiries—although certainly not exhaustive—to ask when determining whether the contestant brought (and maintained) the contest in good faith and with probable/just cause:

1. Was there substantial likelihood the contest would be successful?
2. Was the contestant's subjective belief that the will is defective objectively reasonable?
3. In bringing the contest, did the contestant rely on the advice of counsel in good faith and with full disclosure of the facts?
4. Did the testator anticipate a possible contest and insert the no contest clause for that reason, or was the clause just boilerplate in the lawyer's form?
5. Did the testator's lawyer meet with him to discuss the possible ramifications of disinheriting the contestant or giving him a smaller portion of the estate?
6. Was the contest based on something other than the fact that the contestant was not treated equally in the will?
7. Was the contest brought for a reason other than that the contestant is disgruntled or there was family discord or disharmony?
8. Was each of the contestant's claims supported by evidence, or was the pleading simply a catalogue of every possible cause of action?
9. Was there evidence the physical or mental health of the testator was compromised at or near the time of the execution of the will?
10. Is the contestant also attempting to probate a different will benefitting him which was made under questionable circumstances?
11. Did the testator leave any written notes or did the testator write a letter to his attorney expressing his testamentary intent?
12. Was the will being contested procured by a care-giver or fiduciary of the testator?

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272. *Id.* (quoting RESTATEMENT (THIRD) OF PROP.: WILLS & DONATIVE TRANSFERS § 8.5 cmt. c (AM. LAW INST. 2003)).
273. *Id.* at 209.
274. *Id.*

13. Does the will primarily benefit persons who are not objects of the testator's bounty?
14. Does the will being contested differ markedly from previous wills?
15. Was the testator living with the primary beneficiary and/or dependent on the primary beneficiary for her care and maintenance?
16. Was the will signed in a hospital or nursing home?
17. Was the will executed in close proximity to the testator's death?
18. Were the witnesses to the will related to or close friends with the primary beneficiary?
19. Are there any facts or circumstances which suggest the testator was not able to voluntary and carefully exercise his freedom of disposition?
20. Are there video or audio recordings which call into question the circumstances of the will signing (such as, the testator appears impaired, the testator's handwriting is shaky, the testator failed to read the will, the primary beneficiary was present in the room, or the witnesses were unfamiliar with the testator)?[275]

The existence of these facts and circumstances should, it would seem, greatly enhance the likelihood the contestant will be able to establish that he brought the contest in good faith and with just cause, even if the will is not ultimately set aside.[276]

XII. TEXAS REQUIRES THAT THE CONTEST BE BROUGHT AND MAINTAINED IN GOOD FAITH

When the Texas House Bill 1969 was originally introduced, it required that the action be "brought in good faith."[277] The first amendment to the bill created an additional requirement and stated that the action must "be brought *and maintained* in good faith."[278] The amendment indicates that the legislature believes maintaining an action in good faith is also important.[279] The Legislature created the new language to ensure that the contestant would drop suit when "facts are revealed or circumstances change in such a way that makes it clear the testator's intention or purpose is contrary to the contestant's assertions."[280] Additionally, such language "encourages the

275. *See supra* notes 28, 106, 174, 187–94, 205–06, 193, 214, 217, and accompanying text.
276. *See, e.g.*, *supra* text accompanying notes 217–36.
277. Ryann Lamb, *Will Contests in Texas: Did the Codification of the Good Faith and Probable Cause Exception Render in Terrorem Clauses Meaningless?*, 63 BAYLOR L. REV. 906, 925–26 (2011) (citing H.J. of Tex., 81st Leg., R.S. 4735 (2009)).
278. *Id.* at 926 (emphasis added).
279. *Id.*
280. *Id.*

preservation of judicial resources by forcing a contestant's suit to be dropped when [the contestant] can no longer pursue an attack on the will in good faith."[281]

XIII. If You Want to Rely on the Good Faith and Just Cause Defense, You Have to Plead It and Prove It

If the defendants meet the contesting party with a defense invoking the *in terrorem* clause, and the contesting party intends to rely on the statutory good faith and just cause exception, the contesting party should specifically plead the applicability of the exception and then offer proof of the applicability of the exception at trial.[282] Section 254.005 of the Texas Estates Code states the person who brings an action contrary to the forfeiture clause must establish "*by a preponderance of the evidence* that: (1) just cause existed for bringing the action; and (2) the action was brought and maintained in good faith."[283]

In *Gunter v. Pogue*, devisees filed a will contest as to three of four wills and lost as to one of them.[284] The second will contained a no-contest clause stating that any person who contests the will gets $10.00.[285] Subsequently, the executors informed devisees that they had triggered the *in terrorem* clause and would receive $10.00.[286] The trial court chose to disregard the clause and to compel distribution.[287] On appeal, the devisees argued that because their original contest was in good faith and with probable cause, the no-contest clause did not apply.[288] Although the appellate court agreed with the non-contesting beneficiaries and reversed the trial court, the court dismissed the appeal without making a determination on whether the probable cause exception existed in Texas.[289] The appellate court found that there was no Texas case directly on point that would support the good faith exception.[290] However, since the devisees did not secure a finding on the issue from the judge or jury, the issue was not properly preserved for appeal and the court

281. *Id.*
282. *See infra* notes 307–326.
283. TEX. EST. CODE ANN. § 254.005 (West 2015) (emphasis added).
284. Gunter v. Pogue, 672 S.W.2d 840, 841 (Tex. App.—Corpus Christi Court 1984, writ ref'd n.r.e.).
285. *Id.* at 842.
286. *Id.*
287. *Id.*
288. *Id.*
289. *Id.* at 843.
290. *Id.*

could not pass on the issue of the applicability of the urged exception.[291] Therefore, since the will was contested, the clause was triggered.[292]

Likewise, *Hammer v. Powers* involved a will contest filed on the basis of lack of testamentary capacity.[293] The trial court granted the executor's motion for summary judgment and probated the will, enforcing the no contest clause.[294] The court subsequently issued a ruling that the contesting parties' bequests were forfeited as a result of the no-contest clause.[295] The contestants argued on appeal that because their contest was in good faith and upon probable cause, they were excepted from the *in terrorem* clause.[296] The appellate court implied that the good faith exception existed based on *Calvery*.[297] However, because the good faith exception is an affirmative defense, relying on *Gunter*, the court stated that *it must be plead and proved* by the party raising it and since there were no pleadings or proof to that effect, the no-contest clause applied.[298]

In the recent *In re Estate of Gibbons*, the jury found that the contestants lacked probable cause to contest the testator's most recent will, and subsequently "followed the trial court's instruction not to answer the 'good-faith' question if the jury answered the probable-cause question in this manner."[299] The appellate court decided that any error made because the court submitted the issue of good or bad faith to the jury was harmless because the jury made no finding on that particular matter.[300]

In *Estate of Workman*, discussed in detail above, the court pointed out that the contestant "did not call any of his several attorneys to opine on the reasonableness of this belief."[301] Originally, the contestant did not have to present evidence relating to the reasonableness of his claim to prove the underlying undue influence claim.[302] However, because the applicant relied on the no-contest provision to defend against the contestant's claim "it was incumbent upon the contestant to address the good faith and probable cause exception to the no-contest provision."[303] Because the contestant failed to do so, extensive evidence about the no-contest provision stood unchallenged.[304]

XIV. CAN A TESTATOR ELIMINATE THE APPLICABILITY OF THE GOOD

291. *Id.* at 845.
292. *Id.*
293. Hammer v. Powers, 819 S.W.2d 669, 671 (Tex. App.—Fort Worth 1991, no writ).
294. *Id.*
295. *Id.*
296. *Id.* at 672.
297. *Id.* at 673.
298. *Id.* (emphasis added).
299. *In re* Estate of Gibbons, 451 S.W.3d 115, 119 (Tex. App.—Houston [1st Dist.] 2014, no pet.).
300. *Id.* at 127.
301. *In re* Estate of Workman, No. 16-0908, 2017 WL 706342, *5 (Iowa App. 2017).
302. *Id.* at *4.
303. *Id.*
304. *Id.*

FAITH AND JUST CAUSE EXCEPTION?

Before, and especially following, the enactment of a good faith and just cause exception to the bringing of a will contest, many testators inserted language in the *in terrorem* clause which stated words to the effect that the clause was enforceable "regardless of whether the contest is brought in good faith and with just cause."[305] In light of the statute, however, words to that effect do not appear to effectively eliminate the applicability of the good faith and just cause exception.[306]

In *Winningham v. Winningham*, a testator executed a new will shortly before his death which granted significantly more property to his son than had been granted in previously executed wills.[307] The new will contained a forfeiture clause which specifically attempted to eliminate a good faith challenge to the will by denying benefits to any challengers.[308] The Tennessee Supreme Court applied Tennessee's good faith and probable cause exception, holding that a testator cannot throw out the good faith exception *even by specific language*.[309] The court stated, "Courts exist to ascertain the truth and to apply the law to it in any given situation; and a right of devolution which enables a testator to shut the door of truth and prevent the observance of the law, is a mistaken public policy."[310] In *Parker v. Benoist*, the court cited *Willingham* with approval.[311]

In re Estate of Stewart, the testator drafted a trust and a pour-over will, both of which excluded testator's sons altogether.[312] Both the trust and will contained an *in terrorem* clause which stated the clause was effective "regardless of whether any such contest is made in good faith or is ultimately successful."[313] One of testator's sons challenged the will and trust.[314] The son also challenged the validity of the *in terrorem* clause.[315] The trial court found the clause void altogether because it conflicted with the state's probable cause statute.[316] On appeal, the court found the trial court erred in throwing out the clause altogether.[317] However, the court found the clause

305. *See, e.g.*, Winningham v. Winningham, 966 S.W.2d 48, 49 (Tenn. 1998).
306. Robert Kay, *Glossary of Terms Important in Inheritance Issues in Texas,* TEXAS INHERITANCE, www.texasinheritance.com/faq/glossary-of-probate-terms-mainmenu-30/270-in-terrorem (last visited Oct. 7, 2017).
307. Winningham, 966 S.W.2d at 49.
308. *Id.*
309. *Id.* at 52.
310. *Id.* (citing Tate v. Camp, 245 S.W. 839, 844 (Tenn. 1922)).
311. Parker v. Benoist, 160 So.3d 198, 207 (Miss. 2015).
312. *In re* Estate of Stewart, 286 P.3d 1089, 1091 (Ariz. 2012).
313. *Id.* at 1093.
314. *Id.* at 1091.
315. *Id.* at 1092.
316. *Id.*
317. *Id.* at 1094.

conflicted with the probable cause statute, rendering the clause *unenforceable* to the contest.[318]

Although the Texas Estates Code does not state a testator is prohibited from eliminating around the good faith and just cause exception, the Texas Property Code makes the trust code version of the good faith and just cause statute a mandatory rule which cannot be eliminated by the settlor.[319] Since a settlor cannot limit the applicability of the good faith and just cause exception in a trust instrument, it would appear a testator cannot limit the applicability of the good faith and just cause exception in a will.[320]

XV. SO WHAT CAN A TESTATOR DO TO TRY TO PREVENT A WILL CONTEST?

If a testator cannot eliminate the applicability of the good faith and just cause exception to the enforceability of the no-contest clause, then can a testator take some action to attempt to prevent a contest to the will?[321]

A. Dangle a Carrot to Give the In Terrorem Clause Some Teeth

Many testators who choose to insert a no-contest clause in their wills sometimes disinherit the beneficiary, or make a minimal bequest, such as the proverbial $1.00.[322] Therefore, the disgruntled beneficiary has nothing to lose by contesting the will since he gets nothing, or next to nothing, anyway.[323] One way to put some teeth in an *in terrorem* clause—short of attempting to limit the applicability of the good faith and just cause statute—is to make a bequest to the potential contesting beneficiary in an amount which would make the beneficiary think twice about risking what he receives.[324] The challenge of the drafting attorney is to get the testator to commit to giving certain beneficiaries anything of significance because they have decided they want them to get nothing.[325] However, by their insistence to disinherit someone, they incentivize that person to contest the will.[326] How much is enough?[327] That determination would depend on the size of the estate and the nature of the bequests made to other beneficiaries.[328] Whatever

318. *Id.* (emphasis added).
319. TEX. PROP. CODE ANN. § 111.0035(b)(6) (West 2017) (emphasis added).
320. *See* Robert Kay, *supra* note 306.
321. *See infra* Parts XVI.A–E.
322. Kara Blanco & Rebecca E. Whitacre, *The Carrot and the Stick Approach: In Terrorem Clauses in Texas Jurisprudence*, 43 TEX. TECH. L. REV. 1127, 1175 (2011).
323. *Id.*
324. *Id.*
325. *Id.*
326. *Id.*
327. *Id.*
328. *Id.*

the amount, the testator must instill some substantial fear of loss or the clause will be ineffective.[329]

B. Build the "Will Wall"

Mickey R. Davis suggests an interesting strategy whereby the testator could sign a series of wills, each producing greater benefits to the expected contestant.[330] This "will wall" would place the contestant in the position of having to overcome a whole series of wills, with each success costing him more, frustrating the testator's estate plan only if all of the wills are successfully challenged.[331] Obviously, this approach could be a bit cumbersome for the testator.[332]

C. Avoid the Temptation to State Reasons for Disinheritance

In addition to disinheriting someone and inserting an *in terrorem* clause in the will, testators sometimes insist on explaining why they are disinheriting a child.[333] As if it weren't enough for the child to be disinherited, they then have to endure a post-death tongue lashing from their deceased loved one which ends up on the public record.[334] In addition to the risk of committing testamentary libel, hostile statements may provoke the disappointed heir to challenge the will on principle.[335] The following are a few examples from actual wills:

> Unto my two daughters, Frances Marie and Denise Victoria, by reason of their unfilial attitude toward a doting father, . . . I leave the sum of $1.00 to each and a father's curse. May their lives be fraught with misery, unhappiness, and poignant sorrow. May their deaths be soon and of a lingering malignant and torturous nature. May their souls rest in hell and suffer the torments of the condemned for *eternity…*
>
> Before anything else is done fifty cents to be paid to my son-in-law to buy for himself a good stout rope with which to hang himself, and

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329. *Id.*
330. Mickey R. Davis, DAVIS' TEXAS ESTATE PLANNING FORMS 205 (McClure 2016).
331. *Id.*
332. *Id.*
333. *See generally* Judith G. McMullen, *Keeping the Peace in the Family While you are Resting in Peace: Making Sense of and Preventing Will Contest*, 8 MARQ. ELDER'S ADVISOR 61, 85–86 (2006) (explaining different reasons testators disinherit their children and providing examples of wills in which testators explain their reasoning for disinheritance to their children).
334. *Id.*
335. *Id.*

> thus rid mankind of one of the most infamous scoundrels that ever roamed this broad land or dwelt outside of a penitentiary.[336]

If those clauses do not prompt a contest, nothing will.[337] If the testator cannot resist expressing the reasons for disinheriting an heir or treating the testator differently from others, one idea is to have the testator write a letter to the drafting lawyer in the testator's own handwriting explaining the reasons for the manner in which he is disposing his estate.[338] The lawyer then drafts a will consistent with the letter and retains the letter in his file to show any prospective contestant.[339] Having a document in the testator's own handwriting, particularly a letter to his own lawyer, may help to show the disappointing disposition was not the result of undue influence on the testator.[340] Of course, if the testator's handwriting is shaky, or someone else allegedly on behalf of the testator writes the letter, this idea could backfire.[341]

D. Do Not Make a Condition Precedent Provision a Forfeiture Clause

In light of the fact that the good faith and just cause statute is geared toward the enforceability of a forfeiture clause, Professor Gerry Beyer suggests the testator could include a will provision such as: "If [beneficiary] does not contest this will for at least two years and a day following admission of this will to probate [beneficiary] receives [gift]."[342] This provision rewards the potential contestant with a gift for not contesting the will rather than revoking something if a contest occurs.[343] "Instead of a condition subsequent (taking away something already given if the condition is breached, that is, a forfeiture), this type of provision imposes a condition precedent giving something if a condition is satisfied."[344] This is a clever idea which appears, on its face, to avoid the applicability of the statute since it is not, in fact, a forfeiture clause.[345] However, the legislature seems to have adopted the good faith and just cause exception based upon public policy that a beneficiary

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336. *Id.* at 85–86.
337. *See id.*
338. Jesse Dukeminier & Robert H. Sitkoff, *Wills, Trusts, and Estates* 310–11 (9th ed. 2013).
339. *Id.* at 311.
340. *Compare In re* Estate of Kam, 484 S.W.3d 642, 646–54 (Tex. App.—El Paso 2016, pet. denied) (providing an example of a handwritten note by the testator to help prove lack of undue influence), *with* Rothermel v. Duncan, 369 S.W.2d 917, 923 (Tex. 1963) (establishing that the words and acts of a testator are factors to consider when determining a testator's mental health for the purpose of proving undue influence).
341. *See generally* Rothermel v. Duncan, 369 S.W.2d 917, 923 (Tex. 1963) (stating that the totality of the circumstances should be considered when determining if undue influence was exerted om the testator).
342. Gerry W. Beyer, *Will Contests - Prediction and Prevention*, 4 EST. PLAN. & COMMUNITY PROP. L.J. 1, 8 (2011).
343. *Id.*
344. *Id.*
345. *See id.*

should have access to the courts if they have a legitimate basis for their contest.[346] Therefore, courts are likely to find the same rationale applies to a condition precedent provision such as that cited above, even if it is not technically a forfeiture clause.[347] Furthermore, it seems that for such a clause to work, the gift must still be substantial enough that the risks of contesting the will outweigh the benefits of accepting the gift.[348] As discussed above, convincing a testator to make a substantial gift to someone he wants to disinherit is no easy task.[349]

E. Leave the Bulk of the Estate Through a Living Trust

One trick often used by testators as a preemptive strike to a will contest is to make a gift (hopefully somewhat substantial) to the likely contestant at or near the time of the execution of the will.[350] Therefore, when the contestant later contends the testator did not have the capacity to make the will or that the testator was unduly influenced, the contestant can be made to explain why the contestant accepted a gift from an incapacitated or exploited person.[351] While this may be a clever method to impeach the contesting party, it is does not necessarily prevent a contest.[352] A better course may be for the testator to establish a revocable trust and fund it with significant assets at a time when there is little question as to his capacity.[353] The settlor could then make the potentially contesting party a beneficiary, perhaps to a portion of trust income.[354] Although the trust could still be contested, if the trust has had a long life, and particularly if the beneficiary had accepted benefits under the trust, such a contest would appear to lack merit.[355] Even if a contest were brought, it is likely to be determined that the beneficiary is not contesting in good faith and just cause.[356] Further, the settlor could include an arbitration clause in the trust instrument.[357] If the beneficiary has accepted any benefits

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346. *See* Senate Comm. on State Affairs, Bill Analysis, Tex. S.B. 617, 85th Leg., R.S. (2017).

347. *See* Beyer, *Will Contests – Prediction & Prevention*, *supra* note 342.

348. *See id.* at 9.

349. *See* McMullen, *supra* note 333, at 85.

350. *See* Beyer, *Will Contests – Prediction & Prevention*, *supra* note 342, at 9.

351. *See generally id.* (suggesting that offering a gift to the potential contestant of a will which is revocable if the potential contestant challenges the testator's mental capacity may cause the potential contestant to reconsider their position).

352. *See* Beyer, *Will Contests – Prediction & Prevention*, *supra* note 342, at 9.

353. *See generally* Leon Jaworski, *The Will Contest*, 10 BAYLOR L. REV. 87, 90–92 (1958) (explaining that wills and trusts should be created at a time when there is little doubt about the testator's mental state and evidence should be collected at the time of the document's creation supporting the claim that the testator is of sound mental capacity).

354. *See* Ralph M. Engle, *The Pros and Cons of Living Trusts as Opposed to Wills*, 29 EST. PLAN. 155, 161–62 (2002).

355. *Id.*

356. *Id.*

357. *See* Dan Horton, *The Federal Arbitration Act and Testamentary Instruments*, 90 N.C. L. REV. 1027, 1066–67 (2012).

under the trust, the provisions in the trust will bind him, including the arbitration clause.[358]

XVI. CONCLUSION

While there is still freedom of disposition in Texas and across the nation, that freedom can be limited to some extent when the testator's wishes are found to violate public policy.[359] Most states, including Texas, limit the testator's ability to bar a beneficiary when the beneficiary has just cause to contest the validity of the will.[360] Although *in terrorem* clauses remain enforceable in Texas, the advent of the good faith and just cause exception has made testators' reliance on those clauses to prevent will contests less effective.[361] Testators must now be more creative if they want to entice a potentially disgruntled beneficiary to accept what is bequeathed to them (or not) without attempting to thwart the testator's estate plan.[362]

358. *See* Rachal v. Reitz, 403 S.W. 3d 840 (Tex. 2013).

359. Abigail J. Skyas, *Waste Not, Want Not: Can the Public Policy Doctrine Prohibit the Destruction of all Property by Testamentary Direction?*, 25 VT. L. REV. 911, 913 (2001).

360. *See generally*, Robert Payne, *Taking the Terror out of "In Terrorem Clauses"*, MATTERS OF TRUSTS (July 29, 2016), http://www.mattersoftrustlaw.com/2016/07/taking-terror-terrorem-clauses/ (language in *in terrorem* clauses are too strong, so courts often implement good faith and just cause) [https://perma.cc/AC2J-UT9J].

361. Gerry W. Beyer, Rob G. Dickerson, & Kenneth L. Wake, *The Fine Art of Intimidating Disgruntled Beneficiaries with In Terrorem Clauses*, 51 SMU L. REV. 225, 261 (1998).

362. *Id.*

APPENDIX

Summary of State Laws Regarding No-Contest Clauses

No-contest clauses are specifically unenforceable:
  Florida[363]
  Indiana[364]
No-contest clauses unenforceable with respect to certain types of actions:
  California[365]
  New York[366]
  Oregon[367]
No-contest clauses are enforced unless there is probable cause for bringing contest (based on UPC 2-517 and 3-905):
  Alaska[368]
  Arizona[369]
  Colorado[370]
  Hawaii[371]
  Idaho[372]
  Maine[373]
  Massachusetts[374]
  Michigan[375]
  Minnesota[376]
  Montana[377]
  Nebraska[378]
  New Jersey[379]
  New Mexico[380]
  North Dakota[381]
  South Carolina[382]

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363. FLA. STAT. ANN. § 732.517 (West 1975).
364. IND. CODE ANN. § 29-1-6-2 (West 2017).
365. CAL. PROB. CODE § 21311 (West 2010).
366. N.Y. EST. POWERS & TRUSTS LAW § 3-3.5 (McKinney 2011).
367. OR. REV. STAT. ANN. § 112.272 (West 2016).
368. ALASKA STAT. ANN. § 13.16.555 (West 1972).
369. ARIZ. REV. STAT. ANN. § 14-2517 (West 1995).
370. COLO. REV. STAT. ANN. § 15-11-517 (West 1995).
371. HAW. REV. STAT. ANN. §§ 560:2-517, 560:3-905 (West 2000).
372. IDAHO CODE ANN. § 15-3-905 (West 1971).
373. ME. REV. STAT. ANN. tit. 18-A, § 3-905 (West 1981).
374. MASS. GEN. LAWS. ANN. ch. 190B, § 2-517 (West 2012).
375. MICH. COMP. LAWS ANN. §§ 700.2518, 700.3905 (West 2000).
376. MINN. STAT. ANN. § 524.2-517 (West 1994).
377. MONT. CODE ANN. § 72-2-537 (West 1993).
378. NEB. REV. STAT. ANN. § 30-24, 103 (West 1974).
379. N.J. STAT. ANN. § 3B:3-47 (West 1982).
380. N.M. STAT. ANN. § 45-2-517 (West 2016).
381. N.D. CENT. CODE. ANN. § 30.1-20-05 (West 1995).
382. S.C. CODE ANN. § 62-3-905 (2014).

South Dakota[383]
Utah[384]

No-contest clauses are enforced unless there is probable cause for bringing contest (not based on UPC):

Kansas[385]
Maryland[386]
Pennsylvania[387]
Wisconsin[388]

No-contest clauses are enforced unless there is good faith:

Arkansas[389]
Illinois[390]

No-contest clauses are enforced unless there is both good faith and probable cause for bringing the contest:

Connecticut[391]
Iowa[392]
Nevada[393]
North Carolina[394]
Oklahoma[395]
Tennessee[396]
West Virginia[397]

No-contest clauses are enforced unless there is just cause for bringing contest and contest is brought and maintained in good faith:

Texas[398]
Mississippi[399]

No express ruling on whether there is a probable cause exception:

Alabama[400]

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383. S.D. CODIFIED LAWS §§ 29A-2-517, 29A-3-905 (1995).
384. UTAH CODE ANN. § 75-3-905 (West 1975).
385. *In re* Estate of Foster, 376 P. 2d 784, 786 (Kan. 1962).
386. MD. CODE ANN., EST. & TRUSTS § 4-413 (West 1974).
387. 20 PA. STATE. AND CONS. STAT. ANN. § 2521 (West 1994).
388. WIS. STAT. ANN. § 854.19 (West 2017).
389. Seymour v. Biehslich, 266 S.W.3d 722, 726 (Ark. 2007).
390. Estate of Wojtalewicz v. Woitel, 418 N.E.2d 418, 421 (Ill. App. 3d 1981).
391. S. Norwalk Tr. Co. v. St. John, 101 A. 961, 963 (Conn. 1917); Thompson v. Estate of Thompson, No. CV 980417909, 1999 WL 311241 at *4 (Conn. Super. Ct. 1999).
392. Cocklin's Estate v. Watkins, 17 N.W. 2d 129, 133 (Iowa 1945).
393. NEV. REV. STAT. ANN. § 137.005(4) (West 2017).
394. Ryan v. Wachovia Bank & Tr. Co., 70 S.E. 2d 853, 855 (N.C. 1952); Haley v. Pickelsimer, 134 S.E. 2d 697, 701 (N.C 1964).
395. *See generally In re* Estate of Massey, 964 P.2d 238, 241 (Okla. Civ. App. 1998) (stating that testator must be competent to make the will and free from duress and undue influence).
396. Winningham v. Winningham, 966 S.W.2d 48, 50 (Tenn. 1998).
397. Dutterer v. Logan, 137 S.E. 1, 2 (W.V. 1927).
398. TEX. EST. CODE ANN. § 254.005 (West 2015).
399. MISS. CODE ANN. § 91-8-1014 (West 2014).
400. *Compare* Harrison v. Morrow, 97 So.2d 457, 461 (Ala. 2007) (disputing distribution of the will), *with* Kershaw v. Kershaw, 848 So.2d 42, 952 (Ala. 2002) (attacking the disposition of the will).

Vermont[401]

No-contest clauses are <u>enforceable</u> if there is a gift over of forfeited property:

Georgia[402]

No-contest clauses are <u>enforceable</u> unless the contest is successful:

Delaware[403]

No-contest clauses are <u>enforceable</u> without regard to probable cause or good faith:

D.C.[404]
Kentucky[405]
Louisiana[406]
Missouri[407]
New Hampshire[408]
Ohio[409]
Rhode Island[410]
Virginia[411]
Washington[412]
Wyoming[413]

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401. *See generally* Bellows v. Sowles, 55 Vt. 391, 392–96 (Vt. 1883) (using a good faith and just cause standard).

402. GA. CODE ANN. § 53-4-68 (West 1996).

403. DEL. CODE ANN. tit. 12, § 3329 (West 2003).

404. Ackerman v. Genevieve Ackerman Family Tr., 908 A.2d 1200, 1203 (D.C. Ct. App. 2006).

405. *See generally* Johnson v. Smith, 885 S.W.2d 944, 945–46 (Ky. 1994) (stating the court will construe no-contest clauses in accordance with the terms of the documents).

406. LA. CIV. CODE ANN. art. 1519 (2017).

407. Chaney v. Cooper, 954 S.W.2d 510, 519 (Mo. Ct. App. 1997).

408. N.H. REV. STAT. ANN. § 551:22 (2014).

409. Modie v. Andrews, No. C.A. 21029, 2002 WL 31386482, at *3 (Ohio Ct. App. 2002).

410. Elder v. Elder, 120 A.2d 815, 818 (R.I. 1956).

411. *See* Rafalko v. Georgiadis, 777 S.E.2d 870 (Va. 2015) (asserting that “no-contest provisions are prima facie valid in Virginia”).

412. *In re* Kubick, 513 P. 2d 76 (Wash. Ct. App. 1973).

413. Dainton v. Watson, 658 P.2d 79 (Wyo. 1983).