The Forfeiture Clause:

Contest Killer or Paper Tiger?

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I. Introduction

The "*in terrorem* clause," also called a "forfeiture clause" or "no contest clause," was conceived to strike terror into potential beneficiaries to coerce them to accept the wishes of the testator, settlor, etc. The forfeiture clause is a valid tool which can work. However, overuse, to the point of even becoming boilerplate for some draftsmen, has significantly weakened its effect.

II. The Harsh Slap from the Grave

A will is the ultimate last word. It can have a powerful psychological effect on those who are treated differently from the natural succession or from how they expected to be treated. It is the ultimate last word because the speaker (the testator) cannot be challenged directly. A forfeiture provision often adds to the psychological trauma felt by beneficiaries who have gotten less than they expected.

Some dispute the wisdom of a forfeiture provision. Patti Spencer wrote in her Pennsylvania Fiduciary Litigation blog: "It is unhealthy for the living as well as the dead if we use our death as an occasion to get even and settle petty accounts --- with our own children no less."

In one interesting law review article, Marten D. Begleiter, a Duke law professor, supported the validity of forfeiture clauses, advocated the elimination of the probable cause exception in most cases, and even titled his article "Anti-Contest Clauses: When You Care Enough to Send the Final Threat" (26 Ariz. St. L.J. 629).

Eddy M. Elmer, in his article "The Psychological Motives of the Last Will and Testament," wrote:

> Used positively, a will can be used to foster a sense of continuity for the survivors and to preserve family relationships. Used negatively, through imposed conditions, disinheritance, unequal treatment, and attaching strings, a will can be used to control

from the grave and continue dysfunction in a family.

He described disinheritance as "one of the more vengeful goals of will writing."

III. Purposes of the Forfeiture Clause

Forfeiture clauses generally fall into two categories – litigation prevention and lifestyle control. Most of the cases and commentators focus on forfeiture clauses contained in wills. There seems to be no difference between a forfeiture clause in a will and one in a trust. Although the author is not aware of any Texas case that has specifically addressed the validity of a forfeiture clause in a trust, Texas courts have dealt with trust forfeiture clauses as if they are valid. *See* e.g. *Lesikar v. Moon*, 237 S.W.3d 361 (Tex.App.-Houston [14th Dist.] 2007, writ denied); *Conte v. Conte*, 56 S.W.3d 830 (Tex.App.-Houston [1st Dist.] 2001, no writ).

A. Litigation Prevention

This is by far the most common use of the forfeiture clause and the primary focus of this article. The purpose is to punish the person who challenges the instrument in question. More recently, it has also become a common weapon designed to prevent attacks on fiduciaries – a much more controversial use of the forfeiture clause.

This is a typical forfeiture clause designed to prevent will contests:

> If any person, either directly or indirectly, attempts to oppose or set aside the probate of this Will or to impair or invalidate any of the provisions of the will, any devise or other provision I have made to or for that person under this Will is revoked.

Here is a broader forfeiture clause designed to prevent litigation in many different areas:

> 12.6 Will Contest. If any beneficiary under this will in any manner, either directly or indirectly, contests, attacks, or calls into question this will or any of its provisions, or impairs the administration of my estate, any share or interest in my estate given to or for the benefit of that beneficiary and her descendants under this will is revoked and shall be disposed of in the same manner provided herein as if that beneficiary had predeceased me without ascendants or descendants. If either "JANE" or "BRENDA" makes any claim against my Estate of any purpose, then any gift to or for such person, including without limitation the "JANE" TRUST and

> the "BRENDA" TRUST, is revoked and shall be disposed of in the same manner provided herein as if such person had predeceased me.

Here is a forfeiture case designed to insulate fiduciaries:

> It is the Settlor's desire that there shall be not [sic] controversy whatever among the members of his family, or any of them concerning this Trust Agreement or the administration of the trusts created hereunder, and in order, if possible, to prevent such controversy, it is Settlor's will and he hereby expressly provides and makes it a condition precedent to the taking, vesting, receiving or enjoying of any interest in any property or income under or by virtue of the trusts created hereunder that no person or party hereunder shall in any manner contest the trusts created herein or question or contest any provision or recital herein or the operation thereof or any distributions made by the Trustee or any actions taken by the Trustee. Settlor hereby further directs and provides that should any person or party so contest or question, or bring suit, or in any manner whatever directly or indirectly aid in any such contest or questioning, or suit, he or she shall thereupon lose and forfeit all benefits to him or her under the provisions hereof as if the person so contesting or questioning the trust created hereunder or aiding therein had died and such trust of which such person was a beneficiary shall be administered as if such person had died.

The above provision is from *Lesikar v. Moon*, 237 S.W.3d 361, 370 (Tex.App.-Houston [14th Dist.] 2006, writ denied), where the court held that this language could not prevent a beneficiary from suing the trustee for breach of fiduciary duty. That holding is also consistent with the holding in *McLendon v. McLendon*, 862 S.W.2d 662 (Tex.App.-Dallas 1993, writ ref'd n.r.e.), that "the right to challenge a fiduciary's actions is inherent in the fiduciary/beneficiary relationship."

B. Morality and Lifestyle Controls

Testators sometimes use forfeiture provisions to try to control the lifestyles of beneficiaries from the grave. Examples are provisions that dictate forfeiture for marrying outside a certain race or religion; failing to have children within a certain time period; failing to graduate from college; divorcing; etc.

The following is a typical clause that provides for forfeiture based on a beneficiary's conduct:

> In the event, however, that my said son Daniel Jacob is unmarried within the seven

> years after my death to a Jewish girl whose both parents were Jewish, or if he is married to a non-Jewish girl, then his share of my estate, as provided in Item 8 above should go to the State of Israel, absolutely.

Shapira v. Union National Bank, 315 N.E.2d 825 (Ohio Com.Pl. 1974). The *Shapira* court upheld and enforced the conditional bequest.

In at least one Texas case, the court upheld the validity of a gift conditioned on the surviving spouse not marrying again. *See Foote v. Foote*, 76 S.W.2d 194 (Tex.Civ.App.-San Antonio 1934, writ ref'd).

In a particularly troubling case in which we were involved, the testator created a trust for her grandson and provided that he would lose half of his trust if he failed to have a child before he turned forty (that half would instead pass to the local Catholic Diocese). What was most troubling about the situation was that the grandson was ill-equipped to be a father, and knew it. However, in order to save millions of dollars for his family, he fathered a child.

These lifestyle and morality clauses are not subject to any type of probable cause exception. Although one may be able to find loopholes in the language of some of these clauses, the only real defense is that the clause violates public policy or is unconstitutional. The attack in *Shapira* was based upon public policy and constitutionality grounds, but both of those attacks failed.

In *Marion v. Davis*, 106 S.W.3d 860 (Tex.App.-Dallas 2003, writ denied), the testator conditioned all gifts in his will such that any beneficiary who attempted to place the testator's wife into a nursing home before all estate assets were exhausted would forfeit his inheritance. A beneficiary, acting as her court-appointed guardian, placed the wife into a nursing home despite the estate's ability to continue to fund her care at home. The court rejected the public policy arguments and held that following a doctor's orders was no excuse to the forfeiture. The court also held that good faith of the beneficiary would be irrelevant.

These morality/lifestyle clauses are virtually limitless as long as they do not violate public policy, such as compelling divorce, compelling a crime, etc. Bizarre, unusual, or even unfair clauses are frequently validated by the courts under the guise of upholding the testator's intent. Courts tend to treat these clauses simply as conditional gifts.

In any event, these types of clauses are not the focus of this article.

IV. The Genesis of the Forfeiture Clause

As early as 1000 A.D., many English wills contained a prayer to God that He punish those who attempted to alter the will. For example, "He who wishes to alter this will, unless it be myself, may God destroy him now and on the Day of Judgment. Amen." Dorothy Whitelock, *Anglo-Saxon Wills* (Harold Dexter Hazeltine Ed. 1930 at page 83). By the early 1600's, some English wills contained specific forfeiture provisions. In one early reported case, the court dealt with a will that provided "if A molests B by suit or otherwise, he shall lose what is devised to him and it shall go to B." *See Anonymous*, 86, Eng. Rep. 910 (1674).

By the 1860's, no contest clauses were used in American wills. In *Bradford v. Bradford,* 19 Ohio St. 546 (1869), the court considered a will that included the following provision:

> Now, if any of my heirs is dissatisfied and goes to law to break this will, then my will is and I direct that they shall have no part of my estate, and I debar them from any part of my estate whatsoever.

In 1898, the U. S. Supreme Court examined a no contest provision in *Smithsonian Institution v. Meech*, 169 U.S. 398, 413-15 (1898). There the testator stated that his bequests "are all made upon the condition that the legatees acquiesce in this will, and I hereby bequeath the share or shares of any disputing this will to the residuary legatee here and after named." The Court upheld the forfeiture provision because forfeiture provisions were consistent with "good law and good morals."

The Supreme Court also noted:

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

Id. at 415.

As early as 1909, Texas courts were upholding the validity of forfeiture clauses. *See e.g., Massie v. Massie*, 118 S.W. 219 (Tex.Civ.App.-1909, no writ).

Even today, some testators apparently think that there are better ways to control a disgruntled beneficiary than forfeiture. In Norway, a testator who died in 2003 resorted to an unusual way of protecting against a will contest. He wrote, "I take a solemn, holy vow that, if at all possible, I will pursue you in the darkest hours of the night . . . I warn you, in the strongest possible terms not to try any nonsense."

V. The Statutory Basis for Forfeiture Clauses

In Texas, there is no statute that recognizes forfeiture clauses. Many other states, however, have statutory schemes designed to regulate no contest clauses. For example, California has Prob. Code §21303, which provides that "except to the extent otherwise provided in this part, a no contest clause is enforceable against a beneficiary who brings a contest within the terms of the no contest clause." This section is modified with numerous exceptions in §§21305-21321. The California statutes have proved problematic and are currently undergoing revision.

The Uniform Probate Code also has a series of sections dealing with forfeiture clauses,

including a section adopting the probable cause exception (which is discussed more fully below). UPC §§ 20517, 3-905 (1990). At least seventeen states have adopted the Uniform Probate Code sections on forfeiture clauses. A handful of states have also codified a statutory scheme that was not derived from the UPC; some with a codified probable cause exception and some without it. Other states, including Texas, enforce forfeiture clauses based upon state common law.

The writer is aware of only two states that prohibit forfeiture clauses in wills: Florida and Indiana. Fla. Stat. Ann. §732.517 (wills) & §737.207 (trusts); Ind. Code Ann. §29-1-6-2.

VI. Exceptions to Forfeiture Clauses

A. Statutory Exceptions

The Uniform Probate Code specifically codifies the exception for contests based upon probable cause, though it is silent as to good faith. UPC 2-517 and 3-905. The UPC does not define probable cause. Many states have statutory exceptions for contests brought with probable cause. This writer is not aware of any state that has codified a definition of "probable cause"; however, the Restatement (Third) of Property: Wills and Other Donative Transfers §8.5 cmt. (2003) provides that probable cause exists for filing a lawsuit if there is 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."

Numerous states have other statutory exceptions, in particular exceptions which provide that specific causes of action will not trigger a violation of the forfeiture clause. California leads the way with a series of accepted actions which do not lead to forfeiture.

B. Common Law Exceptions

Numerous exceptions are noted in common law – chiefly the probable cause exception. For example, Restatement (Second) of Property, §9.1 (1981) 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 documents, is valid, unless there was probable cause for making the contest or attack.

There are some basic public policy exceptions to forfeiture clauses, including 1) actions for construction of instruments; 2) actions on behalf of minors or incompetents; 3) forfeiture for actions of another; 4) actions for breach of fiduciary duty against an executor/trustee; and 5) suits for an accounting.

In some states, however, even the actions of another can cause the forfeiture of your bequest. In a recent California case, *Tunstall v. Wells*, 144 Cal.App. 4th 554, 561 (2006), the testator left $50,000 each to three daughters, but provided that if any contested, they all forfeited. Surprisingly, the California Court of Appeals upheld the validity of the provision, noting that the testator may have been concerned that they would collude together and have one challenge while the other two stood back. While that makes sense, it seems inconceivable that an innocent beneficiary should forfeit because of the conduct of another.

But that may also occur more frequently than we recognize. In the typical forfeiture clause, the contestant forfeits. However, a number of planners also provide that the children of a contestant forfeit as well (e.g. the second sample clause on page 2). This writer is not aware of a case either upholding or rejecting that type of clause.

VII. Strict Construction

Forfeiture clauses are almost always narrowly and strictly construed and are usually construed against forfeiture, if at all possible. *Estate of Newbill*, 781 S.W.2d 727, 728 (Tex.App.-Amarillo 1989, no writ). For example, in *Sheffield v. Scott*, 662 S.W.2d 674, 677 (Tex.Civ.App.-Houston [14th Dist.] 1983, writ ref'd n.r.e.), the court did not apply a forfeiture clause even though a

"contest motion" had been filed. The court noted that, because the will did not specifically prohibit the "mere filing" of a will contest, the filing alone was insufficient to cause a forfeiture. *Id*. at 67. Forfeiture should occur only when the acts of the parties come strictly within the clause. *Estate of Hodges*, 725 S.W.2d 265, 268 (Tex.App.-Amarillo 1986, writ ref'd n.r.e.).

VIII. Forfeiture Has Been Enforced in Texas

There are at least two reported cases in which a forfeiture, triggered by a will contest, was enforced by the appellate court: *Estate of Hammil*, 866 S.W.2d 339, 343 (Tex.App.-Amarillo 1993, no writ); and *Hammer v. Powers*, 819 S.W.2d 669, 673 (Tex.App.-Fort Worth 1991, no writ). *Marion v. Davis*, 106 S.W.3d 860 (Tex.App.-Dallas 2003, pet. denied), is another case where a forfeiture was upheld, but not because of a contest. The writer is aware of a few other cases where a forfeiture was enforced in the trial court but no appeal was taken to challenge the forfeiture.

IX. The Good Faith and Probable Cause Exception in Texas

In Texas, there has yet to be a definitive case from the Supreme Court that specifically adopts the probable cause exception to forfeiture provisions. Consequently, many lawyers seeking to enforce the provision have argued that the exception does not exist in Texas. This argument is probably without merit. Too many Texas cases have acknowledged the exception in Texas to now ignore it. In *Hammer v. Powers*, 819 S.W.2d 669, 673 (Tex.App.-Fort Worth 1991, no writ), the closest to a landmark case, the court wrote "[a] forfeiture of rights under the terms of a will will not be enforced when the contest of the will was made in good faith and upon probable cause." This exception has been discussed for many years by other courts which usually managed to avoid specifically adopting the rule. *See e.g.*, *Gunter v. Pogue*, 672 S.W.2d 840, 842-843 (Tex.App.-Corpus Christi 1984, writ ref'd n.r.e.), *First Methodist Episcopal Church South v. Anderson*, 110 S.W.2d 1177, 1184 (Tex.App.-Dallas 1937, writ dism'd), and *Calvery v. Calvery*, 55 S.W.2d 527,

530 (Tex. Comm. App. 1932, opinion adopted). As recently as 2005, in *Paul v. Merrill Lynch Trust Co. of Texas*, 183 S.W.3d 805 (Tex.App.-Waco 2005, no writ), the lower court held that the appellants had violated the will's no derivative action and *in terrorem* clause, but did not forfeit their bequests because they filed the action in good faith and with probable cause.

Note that these Texas cases have expanded the probable cause exception to also require that the contest or attack must have been brought in good faith. While "probable cause" might subsume "good faith" in most cases, it seems obvious that one could have probable cause, yet act in bad faith. The Texas exception appears to be more stringent than that contemplated by the Uniform Probate Code, the Restatement, and the law of many other states. Iowa and Kansas also require good faith along with probable cause. *In Re Cocklin's Estate*, 17 N.W.2d 129, 136 (Ia. 1945); *In Re Foster's Estate*, 376 P.2d 784, 786 (Kan. 1963).

In our experience, the existence of the good faith/probable cause exception is a forgone conclusion and we have yet to observe a judge who would not submit the exception in the form of a jury question. An example of a jury question for the Texas good faith/probable cause exception is:

> Did Jim contest the May 1, 1997 will in good faith and with probable cause?
>
> "Good Faith" is defined as an action which is prompted by honesty of intention, or a reasonable belief that the action was probably correct.
>
> "With Probable Cause" means that the actions of Jim in prosecuting this will contest were based on reasonable grounds and that there was a fair and honest cause or reason for said actions.
>
> Answer: _____

Authority: *Ray v. McFarland*, 97 S.W.3d 728, 730 (Tex.Civ.App.-Fort Worth 2003, no writ).

This question is a derivative of the attorney fee question that is submitted in accordance with Texas Probate Code § 243. Section 243 uses "with just cause" instead of "probable cause". One could also use the definition of probable cause from the Restatement quoted above.

In his article "The Fine Art of Intimidating Disgruntled Beneficiaries With *In Terrorem* Clauses", 51 SMU L. Rev. 225, Gerry Beyer proposed the following definition: "'Probable cause' means that the beneficiary reasonably believes in the existence of facts and law which would permit that beneficiary to successfully contest the instrument." The California Law Revision Commission recommended the following definition: "Probable cause exists if, at the time of filing a contest, the facts known to the contestant would cause a reasonable person to believe that there is a reasonable likelihood that the requested relief will be granted after an opportunity for further investigation or discovery." *See* the attached California Law Revision Commission, Pre-Print Recommendation at 26.

X. The Probable Cause Exception in Other States

Some states have specifically rejected the probable cause defense, including California, New York, Massachusetts, and Oregon. New York and Oregon have a few exceptions, such as a contest on the ground of forgery or revocation by later will. New York Estate Powers & Trusts §3-3.5(b)(1) (McKinney 2006); Or.Rev.Stat. §112.272(2) (1997). New York also allows pre-contest investigations, including the deposition of the will witnesses and the draftsperson. EPTL § 3-3.5(b)(3). Once that is concluded, however, if the contestant files a contest and loses, he/she forfeits. In New York, one must also be careful about the depth of the pre-contest investigation. In one case, the contestant, hoping to find out that he was the beneficiary to a greater degree under an earlier will, took the deposition of the draftsperson of the earlier will. The court held that he had gone too far and thus he forfeited his inheritance. *See In re Will of Singer,* 841 N.Y.S.2d 212 (N.Y.Sur.Ct. 2007).

California has generally outlawed the probable cause exception. However, California law allows a party to file a declaratory judgment proceeding to determine if the proposed action would

violate a forfeiture clause. This led to so much preliminary litigation and confusion that California is now rewriting its statutes relating to forfeiture provisions. Initially, it appeared that California would eliminate the forfeiture provision and instead move to a "loser pays" rule where the contestant who lost his contest would pay the other side's attorneys' fees (likewise, if the contestant won, he/she might receive attorneys' fees from the will proponent). Instead, it appears that California is headed toward a probable cause exception for contests on the grounds of "menace, duress, fraud, or undue influence". *See* California Law Revision Commission, Revision of No Contest Clause Statute, Pre-Print Recommendation, January 2008. The Pre-Print Recommendation contains an interesting discussion of the forfeiture clause and various exceptions. Because of its relevance and recent publication, it is attached for convenience.

XI. How the Draftsman May Circumvent the Exceptions

Because the good faith/probable cause exception has become accepted by many Texas estate planners, clever draftsmen have tried a variety of methods to circumvent the exception. The most common is for the draftsman to include language in the forfeiture clause that specifically states that the forfeiture clause applies even if the contest is brought in good faith and with probable cause. Although no Texas court has specifically rejected the use of this language, it does not seem likely that an individual can override this court-created safe harbor.

Others have attempted to devise alternative consequences that have the same effect as forfeiture, e.g., shifting the expenses of administration or taxes to the bequest to the contesting beneficiary. Others have tried preemptive strikes requiring the potential contesting beneficiary to take steps to ratify the bequest in order to even be considered to receive the bequest. From a legal standpoint none of these tactics should work, but they do probably increase the psychological trauma on the beneficiary which significantly increases the overall deterrent value of the clause in

the first place.

Here are some examples:

This clause attempts to force the beneficiary to ratify the will to avoid a contest:

> 2.1 If "JANE" survives me, and subject to conditions in this section, the sum of One Million Dollars ($1,000,000) free of estate and inheritance taxes shall be distributed to the trustee then serving of the Trust, provided that, on the later of (i) 60 days after my death or (ii) 14 days after receipt of the Release Agreement (the "Deadline Date"), "JANE" shall sign a Release Agreement in a form approved by my Executor, stating that she will not make any claims or demands, directly or indirectly, against my Estate, any executor of my Estate, the Management Trust, the trustee of the Management Trust, any other trust created by me and the trustees of such trusts, "Mike", "Mack", "Mark", and their heirs, successors and assigns (collectively the "Releasees"), for any reason or purpose, including but not limited to, that JANE will not make any allegations or claims that we have entered into any formal marriage or common law marriage arrangement. In the event that "JANE" (i) fails to sign the Release Agreement by the Deadline Date, (ii) does not survive me, (iii) makes any claim or demand against any Releasee for any reason or purpose, or (iv) alleges that she is my formal or common law spouse, the gift to the Trust hereunder shall lapse as if "JANE" had predeceased me, and such gift shall be distributed with my residuary estate.
>
> 12.6 Will Contest. If any beneficiary under this will in any manner, either directly or indirectly, contests, attacks, or calls into question this will or any of its provisions, or impairs the administration of my estate, any share or interest in my estate given to or for the benefit of that beneficiary and her descendants under this will is revoked and shall be disposed of in the same manner provided herein as if that beneficiary had predeceased me without ascendants or descendants. If either "JANE" or "BRENDA" makes any claim against my Estate of any purpose, then any gift to or for such person, including without limitation the "JANE" TRUST and the "BRENDA" TRUST, is revoked and shall be disposed of in the same manner provided herein as if such person had predeceased me.

As a practical matter, the above clause worked. The beneficiary was receiving $1,000,000, but her upside was only $2,000,000. The fear of losing the $1,000,000 was enough to scare her off. From a legal standpoint, however, this tactic is fraught with problems. With the above clause, the draftsman is hoping that the ratification will bar the beneficiary from contesting the will and seeking more. There are many defenses to the claim of ratification that should be applicable – duress, fraudulent inducement, lack of fairness, failure to disclose material facts, etc. The chief problem is

that the executor, a fiduciary, is obtaining a signed ratification and release from a beneficiary. In general, such a document is not valid unless the beneficiary knew of his rights and of all material facts which the executor knew, or should have known, and that it was fair and reasonable.

Here is an example of a clause that attempts to shift taxes and expenses of administration to the contestants in the event of a good faith challenge:

> If any devisee, legatee or beneficiary under this Will, or any legal heir of mine, or person claiming to be such, or under any of them, shall contest this Will, or attack or seek to impair or invalidate or anticipate any of its provisions, or participate in or voluntarily assist anyone attempting to do any of these things, in that event, I bequeath to each person, or his issue in the event such person's original share of my estate would pass to his issue if treated as a lapsed legacy or devise, the sum of One Dollar ($1.00) only, and all other legacies, bequests, devises, and interest given under this will to that person, if any, shall be forfeited and shall augment proportionately the shares of my estate going under this Will or in trust for such of my devisees, legatees or beneficiaries as shall not have participated in such acts or proceedings. Further, any and all fiduciary appointments of such contesting party or parties in my Will shall be automatically revoked.
>
> In the event this in terrorem clause is overruled or held to be inoperative, then, notwithstanding any other provisions to the contrary in this my Last Will and Testament, all federal estate taxes, state inheritance taxes, federal income taxes due as a result of my death or at the time of my death, along with all expenses of administration, debts of last illness, and expenses and attorney's fees incurred by my executor in defending this Will, are to be assessed against and deducted from the contestant's share of my estate.
>
> Finally, it is my recommendation that in the event my executor should successfully defend a contest of my Will, that he immediately file and commence a malicious prosecution and "abuse of process" action naming both the contestant or contestants and their legal advisors as parties defendant.

To this writer, it is doubtful that the above language makes the forfeiture provision stronger than an ordinary forfeiture provision. If the contest is brought in good faith and with probable cause, the contestant will avoid forfeiture. It does not seem likely that a testator can circumvent the common law exception merely by calling the forfeiture a different name; i.e., an assessment of taxes and expenses. As a general rule, one cannot do indirectly what one is barred from doing directly.

Trammell Crow Co. v. Harkinson, 944 S.W.2d 631, 634 (Tex. 1997). But there is also a specific problem with this language that a court could easily latch onto. The shifting of taxes and expenses only takes place if the forfeiture clause is "overruled or held to be inoperative." It seems to this writer that a finding of good faith and probable cause does neither. Since courts strictly construe the clauses, it is doubtful that this one would work.

XII. Efforts to Expand the Scope of Forfeiture Clauses

Forfeiture clauses started out as simple clauses that dictated a forfeiture by a beneficiary who contested the will. Clever estate planners have tried to expand forfeiture provisions to cover every conceivable type of litigation that could be filed in connection with the estate and to thwart the probable cause exception. However, this expansion just creates a new set of problems. In particular, it undermines the effectiveness of the forfeiture clause.

By making the forfeiture clause overbroad, one runs the risk that it will create ambiguities and/or contradictions that render it unenforceable. In addition, making the clause overreaching itself creates evidence that the testator himself was overreached or unduly influenced, because it seems so unlikely that the testator came up with it on his own. Forfeiture clauses that go so far that they seem to "rub the beneficiary's face in it" often backfire and upset the beneficiary so much that he will risk the forfeiture. And, those clauses will be argued by the contestant to be proof of the undue influence upon the testator.

The clause that attempts to enforce a forfeiture on a beneficiary who sues the executor over the administration of the trust is another good example. What testator in his right mind would seek to prevent a beneficiary from suing the executor for conversion, fraud, or outright theft? These types of clauses are probably unenforceable anyway, *see Lesikar v. Moon*, 237 S.W.3d 361 (Tex.App.-Houston [14th Dist.] 2007, writ denied), but they can be used to highlight that the testator

either did not know what he was doing, or was coerced by some evildoer to shield the intended bad acts of that evildoer.

Also problematic are clauses that seek to expand the forfeiture clause to those acting indirectly; those who "participate in or voluntarily assist anyone attempting to [contest]"; or those who "call into question this will or any of its provisions". These provisions will be hard to enforce because they are so overbroad. Whether someone has indirectly participated is pretty murky. And what about this "calls into question this will or any of its provisions" language? What is a beneficiary called to testify supposed to do? Lie? This issue was somewhat addressed in *Hazen v. Cooper*, 786 S.W.2d 519 (Tex.App.-Houston [14th Dist.] 1990, no writ), where one of the beneficiaries testified without being subpoenaed and also provided documents that were introduced into evidence. The will contest failed, and some of the remaining beneficiaries sued to deprive the testifying beneficiary of her share through the forfeiture clause. The trial court granted summary judgment against the testifying sister. The appellate court avoided the question of the validity of some of the broader language, but recognized that the provision under some circumstances might violate public policy. Instead, the court held that there was insufficient evidence to show that the testifying beneficiary's testimony aided the unsuccessful will contest. The court specifically focused on the fact that the content of her testimony could not trigger the forfeiture clause because of public policy reasons.

Cases like *Hazen*, however, have raised the concern that beneficiaries who are not contesting should avoid testifying without a subpoena. In other words, they should not voluntarily appear. In fact, some forfeiture clauses specifically direct a forfeiture for anyone who voluntarily testifies. From our perspective, this is a huge mistake. Once again, the breadth of such a forfeiture clause will come back to haunt the testator because it appears that the draftsman is trying to muzzle

the truth. There is no reason to do such a thing unless there is something to hide.

XIII. Drafting a Forfeiture Provision That Can Work

Many forfeiture provisions are pointless. Either they are included in wills that will never be contested, such as a will dividing property evenly between all of the testator's children, or inserted in a will where the testator has disinherited someone entirely. In the latter situation, the forfeiture provision is meaningless, because it does nothing to punish the potential contestant, who has nothing to lose. According to Gerry Beyer, it takes equal parts of psychology, mathematics, and measured generosity to use a forfeiture provision effectively. He says:

> You've got to give the person you are trying to disinherit a nice chunk; you've got to give them enough so that they'll be too afraid to risk losing it. You can't leave them $100 if they would get $5,000 or $50,000 in intestacy. You've got to scare them or it won't work.

That should be obvious, but many wills contain the stick of a forfeiture provision but not the carrot of a meaningful bequest.

We have seen several forfeiture provisions that served their purpose by creating enough terror to cause the disgruntled beneficiary to skip the challenge. One contained a $150,000 bequest where the upside was almost $1,000,000, and the other (mentioned above) contained a $1,000,000 bequest where the upside was $2,000,000. These worked, even though our firm believed that a contest would likely be successful and that the good faith/probable cause exception would likely prevent forfeiture in any event.

The best forfeiture clause is simple and clear, and sticks to the purpose – it commands a forfeiture by those who contest the will or trust. If possible, it names the beneficiaries that the testator is worried about and it always provides those beneficiaries with meaningful gifts under the circumstances. If the testator cannot identify the beneficiary he is worried about or if he has not given that potential beneficiary enough to put the beneficiary to the choice, then the forfeiture clause

probably should not be in the will in the first place. A good forfeiture clause should omit all of the language designed to say "I really mean it" and the other overbroad provisions discussed in this article.

XIV. Avoiding the Application of the Forfeiture Clause

Because no lawyer can guarantee that a case will fall within the probable cause exception, many clients are scared off by a forfeiture clause. Like the draftsmen who are trying to create new ways to circumvent the exceptions, clever litigators are constantly looking for ways to circumvent the forfeiture clause in the first place. The most obvious is to have the person with the smallest interest bring the contest or, if there are multiple beneficiaries receiving similar interests, picking just one to bring the contest. Using this approach requires some caution. The "directly or indirectly" and "aid or abet" language in many forfeiture clauses is designed to catch just this sort of conduct. However, it seems that it will be the proponent's burden to prove that someone did, in fact, aid and abet or indirectly contest the document. Having just one aggrieved beneficiary contest can also undermine the contest. The proponent will undoubtedly argue that if the case is so good, why aren't the other aggrieved beneficiaries contesting?

Another approach is to find a different legal capacity for the contestant, so that it is no longer the beneficiary contesting in his individual capacity. This may be an infrequently available method, but it appears to have some case support, especially in view of *Conte v. Conte*, 56 S.W.3d 830 (Tex.App.-Houston [1st Dist.] 2001, no pet.). In *Conte,* the co-trustee daughter tried to remove her co-trustee brother, and sought a declaratory judgment that her suit would not violate the forfeiture clause. Both the trial court and the appellate court ruled that it would not as a matter of law. The appellate court focused, in part, on the fact that the clause did not prohibit any action by a co-trustee, but instead addressed only actions by beneficiaries. Another example of a situation

where the parties might be able to use a different capacity would be bringing the case as guardian or as next friend of a minor or incapacitated person.

Another tactic that can avoid the application of the forfeiture clause is to have the contest filed by a named executor in an earlier will who is not a beneficiary of the challenged will.

One interesting method that appears to work from a legal standpoint is for the aggrieved beneficiary to disclaim a small portion of his or her inheritance to, for example, an adult child and then have that adult child file the contest. The adult child would have his small interest at risk, but no one else would risk their inheritance. While this tactic should work from a legal standpoint, it has practical deficiencies. First, it will be fairly obvious to the proponent what has happened and the proponent will likely join the aggrieved beneficiaries as parties. At that point, what position will the aggrieved beneficiaries take? One that conflicts with their child? This disclaimer tactic also sends a horrible message to the jury. Since the probable cause exception seems so clear, the message to the jury is that the aggrieved beneficiaries do not believe the contest is supported by probable cause, which is presumably why they failed to bring the case themselves.

Other avenues that have been tried are declaratory judgment actions, accounting procedures, and breach of fiduciary claims.

In the case of a pre-probate challenge, probably the simplest approach is merely filing a general denial. The burden is already on the proponent to prove due execution and capacity. Unless there is an undue influence challenge, the aggrieved beneficiary does not have to plead anything other than a general denial in order to have what amounts to a will contest without actually contesting anything. There is no case yet that says filing a general denial constitutes a contest within the meaning of a forfeiture clause.

Some states provide for some preliminary investigation in order to determine if one has a

case without risking forfeiture. As noted above, in New York, one can take the deposition of the will witnesses, notary, and draftsman without pain of forfeiture. In California, one can file a declaratory judgment action to determine if the planned action relative to the will or trust would violate the forfeiture clause. While it is not clear that similar declaratory judgment actions can be filed in Texas, that is what happened in *Conte v. Conte infra*.

XV. Whose Burden Is It?

Once a contest has been filed, the question arises: who has the burden of proof in connection with the forfeiture clause? The person claiming that a bequest was forfeited, or the person seeking to avoid forfeiture? No case has dealt with this directly, but in *Hammer v. Powers*, the court specifically wrote:

> A forfeiture of rights under the terms of a will will not be enforced where the contest of the will was made in good faith and upon probable cause. [citation omitted]. **In order to avoid forfeiture of their bequest, the appellants would have had the burden at trial to prove that their contest was made in good faith and upon probable cause.** [citation omitted].

Hammer v. Powers, 819 S.W.2d 559, 673 (Tex.App.-Fort Worth 1991, no writ).

Hammer tells us that the contestant must submit their jury question on good faith and probable cause in the underlying contest. The question should probably not be conditioned on losing the case either. Meanwhile, it doesn't appear that the proponent of the will containing a forfeiture clause needs to do anything. Based on the decision in *Hammer*, if the contestant loses the will contest and fails to obtain the jury finding, he or she forfeits. *Hammer* is consistent with our view.

But what about the case of *Soefje v. Jones*, WL 2434138 (Tex.App.-San Antonio 2008)? There the parties had been in a series of lawsuits. The person claiming forfeiture had not done so in the district court litigation, but did so on appeal. Rather than determining that the matter was not

ripe for the Court of Appeals, the court stated that "Peggy's assertion that an allegation of fraudulent inducement raises the issue of the applicability of the *in terrorem* clause, had to be raised before the trial court and perfected by notice of appeal."

Hazen v. Cooper, 786 S.W.2d 519 (Tex.App.-Houston [14th Dist] 1990, no writ) was also a case where a subsequent suit was brought to declare a forfeiture. Our view is that in the event of an action falling squarely within the terms of the forfeiture, without a finding of good faith and probable cause, the executor or trustee can treat the bequest or gift as forfeited. If forfeiture is unclear, if the fiduciary wants some protection himself, or if the other beneficiaries want to enforce it, a suit can probably be brought to declare a forfeiture. If the beneficiary already has some or all of the bequest, then a lawsuit will have to be filed to establish a forfeiture and get it back. The court in *Soefje* did not preclude the beneficiary from seeking enforcement in another proceeding – only from raising it in the appeal.

XVI. So How Does One Prove Good Faith and Probable Cause?

In our experience, the best way to circumvent a forfeiture clause with a finding of good faith and probable cause is to show that the other side is evil and that your side is not – or, at least, is less evil. The equities are easily the most powerful tools in any will contest, and that is true in proving good faith and probable cause. The better the relationship that the contestant had with the testator, the easier it will be to prove good faith and probable cause. The worse the relationship, the more aggressive you must be in developing the evidence to support the probable cause finding. If at all possible, one would show that the proponent was evil; was involved in the drafting of the document; was involved in siphoning off the testator's money beforehand; etc.

Probably the most important factor is for the lawyer to try the case effectively, fairly, and honestly. In our experience, good faith and probable cause is highly influenced by the jury's view

of the contestant's lawyer.

Here is a good analogy. Under Tex.Prob.Code §243, a contestant can recover his attorney's fees if he defended an earlier will in good faith and with just cause. In our view, the finding is virtually identical to what would be submitted in connection with a forfeiture. In the early 2000's, we successfully contested a will based upon the proponent's undue influence. Although the jury found that the proponent had unduly influenced his father, the jury nevertheless found that he had offered the will in good faith and with just cause. Their basis for doing so was the effectiveness and credibility of his lawyer. Granted, it is easy to see that the attorney issue might be decided differently because the fees would seem to be linked to the attorney's conduct, whereas the forfeiture would be linked to the party's conduct. But the reality is that the good faith of the contestant is primarily measured by the good faith of the lawyer who tries the case.

In the early 1990's, we successfully removed a trustee, hit him with millions of dollars in actual damages, and over twenty million dollars in punitive damages; but he still recovered his attorney's fees in the defense of the removal action because the jury concluded that he had defended his removal in good faith and with just cause. Think about that: the jury blasted the trustee with $20,000,000 in punitive damages, but found his defense to be in good faith and with just cause. The simple reason is that the trustee had a fine lawyer who was fair, courteous, and credible.

XVII. The Evil Tool of the Undue Influencer

Many commentators urge the elimination of the probable cause exception. Professor Begleiter advocates this position in his 1994 law review article, "Anti-Contest: When You Care Enough to Send the Final Threat". Gerry Beyer (along with Rob Dickenson and Kenneth Wake) advocated the same in his 1998 *S.M.U. Law Review* article, "The Fine Art of Intimidating Disgruntled Beneficiaries with *In Terrorem* Clauses." Although each argued that a probable cause

exception to the validity of a no-contest clause violates the expressed intent of the testator, neither gave sufficient justification for allowing an undue influencer to have one more tool in his arsenal to steal an estate.

One of the biggest problems with a forfeiture clause is that it is a common tool of the undue influencer. That becomes even more obvious when it is used not only with respect to the contest of the will, but the administration of the estate, trust, partnership, or other entity.

Professor Begleiter quotes Justice Miller (concurring in part and dissenting in part) in *Barry v. American Sec. & Trust Co.*, 135 F.2d 470, 473-74 (D.C.Cir. 1943):

> the person who will be discouraged and restrained [by a rule strictly enforcing no contest clauses] is just the person whose right to litigate the public policy should be most concerned to protect: poor, timid people; children, widows, incompetents . . . if fraud, coercion and undue influence . . . can be covered up and made secure by the insertion of a forfeiture condition into a will, then, far from establishing a beneficent rule of public policy, we may, instead, be putting another weapon into the hands of the racketeer.

Professor Begleiter shrugs this off by saying: "In most cases, the insertion of a no contest clause will not insulate the 'con man'." He says this because in the vast majority of cases a successful contest will result in the voiding of the no contest clause anyway. He ignores the chilling effect that the forfeiture clause has in the first place, and assumes that, whoever the contestant is, he will always contest despite the no contest clause. That claim ignores virtually every premise he cites for supporting the validity of the clauses in the first place – discouraging litigation and maintaining family privacy.

In our experience, forfeiture clauses, when used properly with a sufficient "chunk" of money, do have a chilling effect on potential contestants. We rarely see a will that we believe has been procured by undue influence that does not contain a forfeiture provision. Given the view of so many lawyers that undue influence cases are virtually impossible to win, it is not surprising that a

forfeiture clause in that situation would provide significant protection to the undue influencer.

XVIII. A Trap for the Sloppy Lawyer

As discussed earlier, the forfeiture clause is overused and has become boilerplate for many draftsmen. This often comes back to haunt them. Take, for example, the will which leaves all of the property to the stepfather of the testator's children, but, nevertheless, contains a forfeiture provision. That forfeiture provision is meaningless because the children have nothing to lose, but at the same time, it can be evidence that the testatrix did not understand the document or did not understand that her children were excluded. We have seen these meaningless forfeiture clauses in sloppy holographic wills; we have seen them in wills that were obviously done by lawyers without a lot of drafting experience; and we have seen them included in wills drafted by some of the finest estate planners in the state. Recently, we were involved in a will and trust contest where the $40,000,000 trust was left to the widow (stepmother of the children) and, after her death, to a charitable foundation. The will contained a forfeiture clause. Who was that forfeiture clause designed to terrorize? The problem with that misplaced clause was that it allowed the contestant to contend that the testator obviously did not know what the will provided. Was he incapable of understanding the clause, or did the testator think that his children were actually beneficiaries of some sizeable portion of his estate?

Worse are cases where the forfeiture clause leaves the totally disinherited contestant the sum of one dollar if she contests. In that case, the contestant actually gets more- a dollar- if she contests than if she does not contest. We have seen these types of clauses in hastily prepared wills by lawyers without a lot of experience and again by some of the finest estate planners. Did the testator really intend to give the contestant more if he contested than if he did not? Isn't that some evidence of the testator's lack of understanding of the contents of the will?

XIX. Conclusion

A forfeiture clause, in its simplest form, is a valid and useful device designed to deter a beneficiary from contesting a will. Coupled with a meaningful bequest to the potential contestant, the clause may put the contestant to a difficult choice. Texas should codify its common law upholding the validity of the basic forfeiture clause. But at the same time, Texas should codify the good faith and probable cause exception that exists in our common law, including a definition of both terms. There is no reason to punish a beneficiary who has probable cause to challenge a will.

Americans are living longer. That longevity increases the likelihood that many will reach their late 80's or 90's. As we see daily, the elderly are targets for fraud, including undue influence. Dispensing with the probable cause exception just makes it more likely that the undue influencer can perpetuate an injustice.

In addition, Texas should adopt a statute that strikes down any forfeiture clause which seeks to shield a fiduciary or to circumvent the good faith/probable cause exception.

ADDENDUM

1. A Summary of Texas Cases that Discuss Forfeiture Provisions

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

This was one of the first Texas cases that validated a forfeiture clause. Father's will declared real property to be separate and left it equally to children; with provision that if any child claimed property was not his separate property, child would forfeit any right to the property so devised. Son sued, stating land was separate property of mother or was community property. Court found that property was community, son made an election to inherit under mother's will and, thereby, son forfeited rights under father's will.

Adams v. Henry, 231 S.W. 152 (Tex.Civ.App.-Amarillo 1921, no writ)

Words and deeds of a beneficiary during the decedent's lifetime cannot trigger forfeiture clause, which takes effect only when will is probated.

Calvery v. Calvery, 55 S.W.2d 527, 530 (Tex. 1932)

The Supreme Court confirmed that "the great weight of authority sustains the rule that a forfeiture of rights under the terms of a will will not be enforced where the contest of the will was made in good faith and upon probable cause," although the court did not decide the case on that ground.

Foote v. Foote, 76 S.W.2d 194 (Tex.Civ.App.-San Antonio 1934, writ ref'd)

Court upheld provision leaving all property to decedent's wife until and unless she remarried, at which time it would vest in the decedent's heirs at law.

First Methodist Episcopal Church South v. Anderson, 110 S.W.2d 1177, 1184 (Tex.Civ.App.-Dallas 1937, writ dism'd)

Court determined that a suit to interpret the will did not violate the forfeiture clause.

Colden v. Alexander, 171 S.W.2d 328 (Tex. 1943)

A suit by the surviving spouse to establish her community property interest in the estate did not violate the no contest provision.

Upham v. Upham, 200 S.W.2d 880 (Tex.Civ.App.-Eastland 1947, writ ref'd n.r.e.)

The court denied, without discussion, that forfeiture clause was violated when the beneficiary sought accounting and partition of his share of estate.

Hodge v. Ellis, 268 S.W.2d 275 (Tex.Civ.App.-Fort Worth 1954), *aff'd in part, rev'd in part*, 277 S.W.2d 900 (1955)

Beneficiary who filed trespass to try title suit to protect his interest in property jointly owned with deceased wife did not violate no contest provision. If the purpose of the suit was to thwart the testator's intent, then it would have been a contest.

Handley v. Boswell, 386 S.W.2d 300 (Tex.Civ.App.-Tyler 1965), *aff'd,* 397 S.W.2d 213 (1965)

Court did not reach issue of in terrorem clause. Reversed and remanded because appellants

did not attach sworn or certified copies of will or order probating will to motion for summary judgment.

Boswell v. Handley, 397 S.W.2d 213 (Tex. 1966)

Affirmed holding of appellate court discussed immediately above.

Lawrence v. Latch, 431 S.W.2d 307 (Tex. 1968)

Jury found for defendants and trial court found that in terrorem clause was violated. Supreme Court did not reach in terrorem clause issue because it reversed and remanded based on improper testimony.

Dulak v. Dulak, 496 S.W.2d 776 (Tex.Civ.App.-Austin 1973, rev'd on other grounds)

Plaintiffs did not contest will, but sought to recover property that belonged to them by virtue of the will, and therefore did not violate in terrorem clause.

Reed v. Reed, 569 S.W.2d 645 (Tex.Civ.App.-Dallas 1978, writ ref'd n.r.e.)

Suit by beneficiaries to construe provision of will devising real estate did not violate no contest clause because it was not a will contest. The two beneficiaries targeted to be disinherited did not even file the petition.

Estate of Minnick, 653 S.W.2d 503 (Tex.App.-Amarillo 1983, no writ)

Request for accounting, partition, and distribution is not a will contest and does not trigger forfeiture provision.

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

Appellants filed a petition possibly contesting the will. Trial court held that appellants did not have standing and dismissed the petition. Appellee brought declaratory judgment action to enforce the in terrorem clause. Court held that in terrorem clause was not violated because no "judicial proceeding" occurred regarding the will that would thwart the intention of the testatrix because the matter was dismissed for lack of standing.

Gunter v. Pogue, 672 S.W.2d 840 (Tex.App.-Corpus Christi 1984, writ ref'd n.r.e.)

Court discussed whether Texas has exception for good faith and probable cause but did not reach the issue. Court held that forfeiture clause was violated because appellees did not obtain finding of good faith and probable cause.

Veltmann v. Damon, 696 S.W.2d 241 (Tex.App.-San Antonio 1985, aff'd in part and rev'd in part on other grounds)

Where beneficiary inherits a portion of property by will, in terrorem clause in will is not violated when the lawsuit pertains to a conveyance of the property rather than an attack on the will.

Estate of Hodges, 725 S.W.2d 265 (Tex.App.-Amarillo 1986, writ ref'd n.r.e.)

Beneficiaries and disinherited sibling entered family settlement agreement and filed declaratory judgment action to declare whether family settlement agreement violated forfeiture clause. Court held that the suit was a request for construction of the will, not an attack, and did not activate forfeiture clause.

Estate of Newbill, 781 S.W.2d 727 (Tex.App.-Amarillo 1989, no writ)

Section 78 challenge to qualifications of executor did not trigger in terrorem clause. That action did not try to vary the testator's purpose or intent. Further, testator named an alternate executor in case the first executor was disqualified. The court commented that even if public policy allowed this action to trigger forfeiture, the provision would have to be spelled out in clear and specific language.

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

Beneficiary who testified on behalf of disinherited sibling did not, as a matter of law, violate the no contest provision. Public policy required her to tell the truth. Summary judgment applying forfeiture clause was reversed.

Hammer v. Powers, 819 S.W.2d 669 (Tex.App.-Fort Worth 1991, no writ)

Affirmed summary judgment holding forfeiture because appellants failed to plead that will contest was in good faith and with probable clause.

McLendon v. McLendon, 862 S.W.2d 662 (Tex.App.-Dallas 1993, writ denied)

The right to challenge a fiduciary's actions is inherent in the fiduciary/beneficiary relationship.

Estate of Hamill, 866 S.W.2d 339 (Tex.App.-Amarillo 1993, no writ)

Forfeiture clause was violated when next friend of minor beneficiary filed will contest and minor, after reaching majority, ratified or adopted the will contest by appealing the judgment. Forfeiture clause was not violated when second beneficiary filed will contest that was later dismissed before any legal proceedings being held, because forfeiture clause did not specifically provide that mere filing of a contest was sufficient to invoke the clause. Other beneficiaries did not trigger forfeiture clause where they opposed payment of a debt to a creditor.

Tieken v. Midwestern State Univ., 912 S.W.2d 878 (Tex.App.-Fort Worth 1995, no writ)

Court did not reach issue of forfeiture where beneficiary informally/orally agreed to contribute to legal fees if will was successfully contested, because will with forfeiture clause was found to be invalid.

Hale v. Badouh, 975 S.W.2d 419 (Tex.App.-Austin 1998), *aff'd in part and rev'd in part*, 22 S.W.3d 392 (Tex. 2000).

Son and mother obtained a judgment against daughter. On mother's death, son applied for a turnover order against daughter's interest in mother's estate to satisfy the judgment. The trial court and the court of appeals found that son's action did not violate the forfeiture clause.

Estate of Conner, 1999 WL 741992 (Tex.App.-Beaumont 1999, no writ)

Court did not reach in terrorem issue because it reversed and remanded summary judgment.

Texas Commerce Bank Nat'l Assoc., 994 S.W.2d 796 (Tex.App.-Corpus Christi 1999, dism'd w.o.j.)

Court questioned, but did not decide, whether forfeiture clause in trust prohibiting

beneficiary from suing trustee for fraud and intentional self-dealing would be valid, because right to challenge fiduciary's actions is inherent in fiduciary/beneficiary relationship.

Estate of Foster, 3 S.W.3d 49 (Tex.App.-Amarillo 1999, no writ)

No contest clause was not triggered when applicants filed will for probate and prior will for probate in the alternative. Offering will in alternative is not a will contest.

Badouh v. Hale, 22 S.W.3d 392 (Tex. 2000)

Request for a turnover order against another beneficiary did not constitute will contest or attempt to invalidate any provision of the will, and thus did not invoke no contest provision.

Thomason v. Cole, 2000 WL 688227 (Tex.App.-Dallas 2000, no writ)

Appellate court could not rule on no contest issue because notice of appeal was not timely filed, and request for findings of fact and conclusions of law filed 28 days after the judgment did not extend appellate deadline.

Conte v. Conte, 56 S.W.3d 830 (Tex.App.-Houston [1st Dist.] 2001, no writ)

(Trust case) In terrorem clause did not address actions to remove trustee. Therefore the clause was not violated by co-trustee (or beneficiary) seeking removal of another trustee. Action to remove co-trustee did not vary the grantor's intent and forfeiture in this situation would deprive individual of statutory rights.

Cason v. Taylor, 51 S.W.3d 397 (Tex.App.-Waco 2001, no writ)

In terrorem clause in prior will was irrelevant because will was revoked by subsequent holographic will.

Estate of Dillard, 2001 WL 139082 (Tex.App.-Amarillo 2001, no pet.)

Court did not address in terrorem clause because the appeal was premature. The trial court order was not final and appealable.

In Re Estate of McKissick, 2003 WL 1847072 (Tex.App.-Corpus Christi 2003, no writ)

Appellate court could not entertain appeal before the determination by the trial court whether the no contest provision applied.

Marion v. Davis, 106 S.W.3d 860 (Tex.App.-Dallas 2003, writ denied)

Decedent's will directed forfeiture by any beneficiary who placed decedent's wife in nursing home while trust assets remained to support her. Beneficiary, as guardian of decedent's wife, placed ward in nursing home and therefore forfeited interest in estate.

Ferguson v. Ferguson, 111 S.W.3d 589 (Tex.App.-Fort Worth 2003, writ denied)

Beneficiary who filed objection to inventory to protect her community property interest that was improperly characterized did not violate in terrorem clause. She was not seeking to change the testamentary disposition. Declaratory judgment filed by executor who was also a beneficiary did not violate in terrorem clause because he filed only for interpretation of terms of agreed judgment.

Estate of Schiwetz, 102 S.W.3d 355 (Tex.App.-Corpus Christi 2003, writ denied)

Application to probate instrument later will did not invoke forfeiture provision in earlier will. It merely sought to establish the decedent's intent.

Paul v. Merrill Lynch Trust Company of Texas, 183 S.W.3d 805 (Tex.App.-Waco 2005, no writ)

Trial court held that beneficiaries' claim violated both the no derivative action clause and the *in terrorem* clause, but filed the action in good faith and with probable cause and thus did not forfeit. The issue was not raised on appeal.

Di Portanova v. Monroe, 229 S.W.3d 324 (Tex.App.-Houston [1st Dist.] 2006, writ denied)

The guardian/beneficiary did not violate *in terrorem* clause by seeking declaration that trustees were authorized to fund a gift to caregivers.

Lesikar v. Moon, 237 S.W.3d 361 (Tex.App.-Houston [14th Dist.] 2007, writ denied)

In terrorem clause did not apply to daughter's claim for breach of fiduciary duty. The right to challenge a fiduciary's actions is inherent in the fiduciary/beneficiary relationship.

Estates of Montez, 2007 WL 4320747 (Tex.App.-San Antonio 2007, no writ)

Forfeiture correctly applied to beneficiary who challenged will on testamentary capacity and sought to set aside trusts. *In terrorem* clause in will and trust is notice to beneficiary of potential consequences. Mere filing of contest does not result in forfeiture. Absent further action, contestant can withdraw contest to avoid forfeiture.

Soefje v. Jones, 2008 WL 2434138 (Tex.App.-San Antonio 2008, no writ)

A claim for violation of forfeiture clause must be raised in the trial court and cannot be raised for the first time on appeal.

2. Celebrities and Prominent People Use Forfeiture Clauses Too and Some of Them Actually Work

Gene Roddenberry's Will

Star Trek creator Gene Roddenberry placed a no-contest provision in his will. His daughter, Dawn, unsuccessfully challenged his will and forfeited $500,000 and part of a trust fund he had left to her. Lisa Sanders, "Want to cut Binky out of the will, do you?" Business Week, March 3, 1997 (The McGraw Hill Companies, Inc.).

Judge Donald Russell

Judge Donald Russell, who served on the U. S. Court of Appeals for the Fourth Circuit from 1971 until 1998 (and also was governor of South Carolina and a U. S. Senator), left a $33,000,000 estate. Two of his children, Mim and Scott, were upset by their treatment in the will. While Scott only got $750,000 in trust, Mim, received one-third of the estate, but her share was placed in trust, divided evenly between her and her three children. Scott and Mim lost badly. First a summary judgment wiped out their contest because of the lack of any evidence supporting it. Then, Mim's children sought to have Mim and Scott disinherited for having brought the litigation in the first place. The trial court found that Mim and Scott had probable cause to believe that Judge Russell had been unduly influenced, and the no contest clauses were therefore unenforceable. But the South Carolina Supreme Court reversed and held that Mim and Scott were disinherited by the no contest clause. *Russell v. Wachovia Bank, N.A.*, 633 S.E.2d 722 (S.C. 2006). To make matters worse for Mim, she was even ordered to pay hundreds of thousands of her opponents' attorney's fees.

Jerry Garcia's Will has a No Contest Clause.

TENTH

NO CONTEST CLAUSE

If any beneficiary of my Will or any Codicil hereto or of the Trusts created hereunder before or after the admission of this Will to probate, directly or indirectly, contests or aids in the contest of the same or any provision thereof, or contests the distribution of my estate in accordance with my Will or any Codicil, the provisions herein made to or for the benefit of such contestant or contestants are hereby revoked and for the purpose of my Will and any Codicil, said contestant or contestants shall be deemed to have predeceases me.

Frank Sinatra's Will Also has a No Contest Clause.

Frank Sinatra put in his will one of the most overbroad forfeiture clauses that anyone will ever see:

CLAUSE TENTH: No Contest Clause.

A. If any devisee, legatee or beneficiary under this Will, or any legal heir of mine or person claiming under any of them directly or indirectly engages in any of the following conduct, then in that event I specifically disinherit each such person, and all such legacies, bequests, devises and interests given under this Will or any trust created by me at any time to that person shall be forfeited as though he or she had predeceased me without issue, and shall augment proportionately the shares of my estate going under this Will to, or in trust for, such of my devisees, legatees and beneficiaries who have not participated in such acts or proceedings:

1. contests this Will or, in any manner, attacks or seeks to impair or invalidate any of its provisions,

2. claims entitlement to any asset of my estate by way of any written or oral contract (whether or not such claim is successful),

3. unsuccessfully challenges the appointment of any person named as an executor or a trustee,

4. objects in any manner to any action taken or proposed to be taken in good faith by my Executor, whether my Executor is acting under court order, notice of proposed action or otherwise, whether such objection is successful or not,

5. objects to any construction or interpretation of my Will, or any provision of it, that is adopted or proposed in good faith by my Executor,

6. unsuccessfully seeks the removal of any person acting as an executor,

7. files any creditor's claim in my estate that is based upon a claim arising prior to the date of this Will (without regard to its validity),

8. claims an interest in any property alleged by executor to belong to my estate (whether or not such claim is successful),

9. challenges the characterization proposed by my Executor of any property as to whether it is separate or community (without regard to the ultimate resolution of the merits of such challenge),

10. challenges the position taken by my Executor as to the validity or construction of any written agreement entered into by me during my lifetime,

11. attacks or seeks to impair or invalidate any of the following:

a. any designation of beneficiaries for any insurance policy on my life;

b. any designation of beneficiaries for any pension plan or IRA account;

c. any trust which I created or may create during my lifetime or any provision thereof;

d. any gift which I have made or will make during my lifetime;

e. any transaction by which I have sold any asset to any child or children of mine (whether or not any such attack or attempt is successful),

12. conspires with or voluntarily assists anyone attempting to do any of these things; or

13. refuses a request of my Executor to assist in the defense against any of the foregoing acts or proceedings.

B. Further, if any of my Wife's issue or my grandchildren do any of the things referred to in this CLAUSE TENTH, then any legacy, bequest, device or other interest which would otherwise pass to my Wife or the parents of my grandchildren who so act, as the case may be shall likewise be forfeited, and such forfeiting legatees shall be deemed to have predeceased me without issue.

C. Expenses to resist any contest or other attack of any nature upon any provision of this Will shall be paid from my estate as expenses of administration.

d. in the event that any provision of this CLAUSE TENTH, including any of the provisions of the subparagraphs of paragraph A hereof, is held to be invalid, void or illegal, the same shall be deemed severable from the remainder of the provisions in this CLAUSE TENTH and shall in no way affect, impair or invalidate any other provision in this CLAUSE TENTH. If such provision shall be deemed invalid due to its scope and breadth, such provision shall be deemed valid to the extent of the scope or breadth permitted by law.