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W. Harry Jack

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NO-CONTEST OR IN TERRORUM CLAUSES IN WILLS — CONSTRUCTION AND ENFORCEMENT

by

W. Harry Jack*

FROM the time of Aristotle and Plato philosophers have debated whether a person should be permitted to dictate without restriction the disposition of his property after death, and thus by his unrestricted fancy and caprice have the ability to pass his property to strangers while making paupers of his children, parents or wife and casting their support upon the state.¹ As a corollary to the above: can a testator include a condition, seeking to insure that his wishes and directions will be carried out without question or litigation, that the gift will be forfeited in case the beneficiary should dispute or contest the will?

Thus, just as philosophers have debated the right of the testator to devise his property without restriction, so the courts and text writers have sharply differed as to whether a condition seeking to insure the performance of the testator's directions should be enforced at all, or to a limited extent.²

Gifts or bequests made on condition that there be no contest or litigation in regard thereto have been termed "in terrorem" provisions. The doctrine of *in terrorem* is based upon the view that the method will bring pressure on beneficiaries to comply with the conditions. As pointed out in one text: "the Rule 'in terrorem' was derived from the civil law and is that a condition subsequent which is against public policy, public decency or good manners, will be treated as in terrorem unless there is a specific devise over. In adopting it the English and American Courts have stricken that part relating to good manners."³

Although the term "in terrorem" is used rather generally, it more correctly should be applied where the provision is regarded as literally *in terrorem*, in the sense that it is used merely to intimidate and coerce the beneficiary and therefore is not enforceable; the provision

* A.B., LL.B., University of Texas; Research Fellow, Southwestern Legal Foundation.

¹ Page, *Wills* § 1.7, at 26 (1960).

² Browder, *Testamentary Conditions Against Contest*, 36 Mich. L. Rev. 1066 (1938); Brown, *Provisions Forbidding Attack in a Will*, 4 Tul. L. Rev. 421 (1930); Keegan, *Provision in Will Forfeiting Share of Contesting Beneficiary*, 12 A.B.A.J. 236 (1926); Parks, *Provisions in a Will Forfeiting the Share of a Contesting Beneficiary*, 3 Wash. L. Rev. 45 (1928). Comment, 24 U. Chi. L. Rev. 762 (1957); Note, 6 N.Y.U.L. Rev. 195 (1929); Note, 23 Colum. L. Rev. 169 (1923); Note, 7 Va. L. Rev. 64 (1920).

³ 96 C.J.S., *Wills* § 992 n. 59 (1957).

may under certain circumstances, however, be considered a proper condition subsequent to carry out the wishes of the testator and would be, therefore, enforceable. It is more accurate in discussing this subject to use the term "non-contest" or "no-contest" provisions or clauses rather than simply "in terrorem" clauses.

Generally speaking, a no-contest provision in a will or trust instrument is a stipulation that in the event of contest or other opposition the contesting beneficiary shall forfeit his legacy or share and shall receive nothing or only a reduced amount (generally a nominal sum). The term thus includes stipulations against disputing, interrupting, litigating or otherwise opposing the carrying out of the will or trust instrument or any of its provisions, as well as clauses specifically forbidding any contest or litigation.

Some of the usual situations in which the draftsman of a will or trust instrument may consider the inclusion of a no-contest provision as being desirable are these: where there already exists a family controversy and differences between members of the family; where there is an unequal disposition of property as between members of the family; where bequests are made to others than the natural objects of the testator's or grantor's bounty; where the state of health or mental capacity of the grantor or testator may give a basis for a claim of lack of testamentary capacity or of undue influence; and where there are circumstances indicating that the grantor or testator would desire to preclude a public examination of his mannerisms, idiosyncrasies or other inquiry into his private affairs.

NO-CONTEST CLAUSE GENERALLY VALID

Generally, the no-contest clause has been held to be valid and not against public policy.⁴ The leading English case is *Cooke v. Turner*.⁵ The testator, after giving his daughter certain benefits out of his real estate, revoked them and gave the estates over in case his daughter should dispute his will or his competency to make it, or should refuse to confirm it when required to do so by his executors. The daughter refused to confirm the will, and, a suit having been instituted to establish it, she disputed its validity and the competency of her father. The court held that the clause of revocation was valid, the gift over took effect, and the benefits given by the will to the daughter were forfeited by her actions. The court stated:

There is no duty on the part of an heir, whether of perfect or im-

⁴ See cases cited in 5 Page, Wills § 44.39 n. 2 (1962).

⁵ 15 M. & W. 727, 14 Sim. 493 (1846).

perfect obligation, to contest his ancestor's sanity. It matters not to the state whether the land is enjoyed by the heir or the devisee, and we conceive, therefore, that the law leaves the parties to make just what contracts and what arrangements they may think expedient, as to the raising or not raising questions of law or fact among one another, the sole result of which is to give the enjoyment of property to one claimant rather than another. The question, whether this proviso is a proviso void as being contrary to the policy of the law, may be well tested by considering how the case would have stood, if, instead of a condition subsequent, it had been made, as in substance it might have been made, a condition precedent.⁶

In 1897 the Supreme Court of the United States decided *Smithsonian Institution v. Meech*.⁷ The testator had devised certain real estate to the institution, although title was vested in his wife, the will declaring: "These 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 hereinafter named."⁸ Certain legatees claimed title under the wife, contrary to the provisions of the will. The Court reviewed the prior decisions in which the provisions of the will were considered as not obligatory but only *in terrorem*. Other decisions were also discussed in which the acquiescence of the legatee appeared to have been a prerequisite to the gift, which was made to terminate upon the legatee's controverting the will or any of its provisions. In such case the legacy was given over to another person, with the restriction no longer continuing as a condition *in terrorem*, but assuming the character of a conditional limitation. The legatees insisted that the devise of this particular real estate to the plaintiff should not stand; that it was not the property of the testator, and could not lawfully be devised by him; and, therefore, that the plaintiff should not take the property which the testator proposed to give the institution. The Court stated:⁹ "From the earliest case on the subject, the rule is, that a man shall not take a benefit under the will, and at the same time defeat the provisions of the instrument. If he claims an interest under an instrument, he must give full effect to it, so far as he is able to do so."¹⁰ Justice Brewer then summarized the Court's decision as follows:

The propositions . . . fully commend themselves to our approval. They are good law and good morals. Experience has shown that often

⁶ 15 M. & W. at 735-36.

⁷ 169 U.S. 398 (1897).

⁸ *Id.* at 399.

⁹ The court cited *Beall and McElfresh Adm'rs v. Schley*, 2 Gill 181, 200, 41 Am. Dec. 415, 418 (1844).

¹⁰ *Smithsonian Institution v. Meech*, 169 U.S. 398, 415 (1897).

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 life that ought never to be made public, and in respect to which the voice of the testator cannot be heard either in explanation or denial, and as 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 legatees 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 a position to use it in the effort to thwart his expressed purposes.¹¹

Generally, the condition against contesting the will has been held to be valid and enforceable where there is a gift over in the event of breach.¹² Where there is no gift over of the property upon a breach of the conditions, however, the authorities are not harmonious as to whether the condition is valid. The English courts hold that the condition is valid as to devises of land but that it is invalid in bequests of personalty, the condition being in such cases mere *in terrorem*.¹³

Some courts in the United States follow the English rule just mentioned, making a distinction as to devises of realty and bequests of personalty.¹⁴ In most jurisdictions, however, the validity of the condition has been assumed whether there is a gift over or not, and whether the property is realty or personalty.¹⁵ As stated by the Supreme Court of Michigan in *Schiffer v. Brenton*,¹⁶ "We hold unequivocally that provisions of the character of the one before us are valid and enforceable, that they apply both to devises of real estate and bequests of personal property . . . irrespective of the good or bad faith of the contest."¹⁷

Thus there is the view, as pointed out in the authorities above,

¹¹ *Ibid.*

¹² See cases cited in 5 Page, Wills § 44.29 n. 3 (1962).

¹³ *Fifield v. Van Wyck's Exr.*, 94 Va. 557, 27 S.E. 446 (1897). The court stated that the *in terrorem* doctrine, "although not based upon any satisfactory reason, was firmly fixed in the law of England at an early day." *Supra* at 448.

As to bequests of land, *Cooke v. Turner*, 15 M. & W. 727 (1946); *Adams v. Adams*, 1 Chan. 369 (1874); and as to personalty, *Morris v. Burroughs*, 1 Atk. 399 (1737).

¹⁴ As to realty, *Barry v. American Security & Trust Co.*, 135 F.2d 470 (D.C. Cir. 1943); *Bradford v. Bradford*, 19 Ohio St. 546, 2 Am. Re. 419 (1869); and as to personalty: *Fifield v. Van Wyck's Exr.*, 94 Va. 557, 27 S.E. 446 (1897); *In re Arrowsmith*, 162 App. Div. 623, 147 N.Y.S. 1016 (1914).

¹⁵ *Smithsonian Institution v. Meech*, 169 U.S. 398 (1898); *In re Cocklin's Estate*, 236 Iowa 98, 17 N.W.2d 129 (1945); and *Annots.*, 5 A.L.R. 1370 (1920), 14 A.L.R. 609 (1921), 26 A.L.R. 764 (1922), and 49 A.L.R.2d 174, 198 (1927); see cases cited 5 Page, Wills § 44.29 n. 7 (1962).

¹⁶ 247 Mich. 512, 266 N.W. 253 (1929).

¹⁷ *Id.* at 255.

that the testator may leave his property to any one he chooses and is at liberty to exclude from his bounty those beneficiaries who unsuccessfully seek to thwart his testamentary wishes, and that there is no duty or right on the part of an heir or legatee to contest or object to the enforcement of testator's wishes.

CONTEST IN GOOD FAITH AND WITH PROBABLE CAUSE

The enforcement of the condition against contest has been criticized by text writers as being against public policy and as offering an effective means of terrorizing the heirs and next of kin who are given any substantial benefits under the will, thus preventing them from contesting the will in cases of fraud, undue influence and the like. Accordingly, a number of courts, on the ground of public policy and with reluctance to declare forfeiture, sharply limit the enforcement of the condition as to contest by specifying that forfeiture will not be decreed where the contest was made in good faith and upon probable cause, the reason being that the testator is assumed to have included such intention in connection with the condition.¹⁸

Many courts have refused to enforce a forfeiture where the contest was deemed to have been made in good faith and on probable grounds under the particular circumstances involved.¹⁹

The reasons for refusing forfeiture where good faith and probable cause exist are stated by the Supreme Court of Connecticut in *South Norwalk Trust Co. v. St. John*:²⁰

The exception that a contest for which there is a reasonable ground will not work a forfeiture, stands upon better ground. It is quite likely true that the authorities to greater number refuse to accept this exception, but we think it has behind it the better reason. It rests upon sound policy. The law prescribes who may make a will and how it shall be made; that it must be executed in a named mode, by a person having testamentary capacity and acting freely, and not under undue influence. The law is vitally interested in having property transmitted by law under these conditions, and none others.

Courts cannot know whether a will, good on its face, was made in conformity to statutory requirements, whether the testator was of sound

¹⁸ Note, 22 Texas L. Rev. 361 (1944).

¹⁹ *Barry v. American Security & Trust Co.*, 135 F.2d 470 (D.C. Cir. 1943); *Wells v. Menn*, 158 Fla. 228, 28 S.2d 881 (1946); *Rudd v. Searles*, 262 Mass. 490, 160 N.E. 882 (1928); *Ryan v. Wachovia Bank & Trust Co.*, 235 N.C. 585, 70 S.E.2d 853 (1952); *Whitehurst v. Gotwalt*, 189 N.C. 577, 127 S.E. 582 (1925); *Wadsworth v. Brigham*, 125 Ore. 428, 259 P. 299 (1927), opinion rehearing, 125 Ore. 458, 266 P. 875 (1928); *Tate v. Camp*, 147 Tenn. 137, 245 S.W. 839 (1922); *In re Friend's Estate*, 209 Pa. 442, 58 A. 853 (1904); *In re Cocklin's Estate*, 236 Iowa 98, 17 N.W.2d 129 (1945). See also Annots., 42 A.L.R. 847 and 42 A.L.R. 1555.

²⁰ 92 Conn. 168, 101 A. 961 (1917).

mind, and whether the will was the product of undue influence, unless those matters are presented in court; and those only who have an interest in the will will have the disposition to lay the facts before the court. If they are forced to remain silent, upon penalty of forfeiture of a legacy or devise given them by the will, the court will be prevented by the command of the testator from ascertaining the truth; and the devolution of property will be had in a manner against both statutory and common law.²¹

There are cases from many other jurisdictions in which the courts did not enforce forfeiture of the no-contest provision where the contest or opposition was made in good faith and upon probable cause (*probabilis causa litigandi*) and was justifiable under all of the circumstances. This exception is based on the view that the provision was not intended by the testator to include a contest on such ground, or because the court considers that a forfeiture in such case would be contrary to public policy. The courts differ as to whether the "weight of authority" is in favor of or against the observance of this exception.²²

In a number of cases enforcement of forfeiture has been decreed even though the contest had been instituted in good faith and with probable cause. In *Barry v. American Security and Trust Company*²³ a will containing a no-contest clause was contested by Barry, a beneficiary. Circuit Judge Parker concluded that the beneficiary thereby forfeited his legacy

irrespective of the question of good faith or probable cause for the litigation The view that the wishes of the testator should be disregarded with respect to the disposition of his property in the interest of greater freedom of litigation does not impress us as resting on a sound or logical basis. . . . The public interest in freeing such contests

²¹ 101 A. at 963.

²² The summary of the law, as set forth in Restatement, Property, seems to support the allowance of will contests where there exists good faith and probable cause. Section 431 states:

Except as stated in §§ 428 and 430, an otherwise effective condition precedent, special limitation, condition subsequent or executory limitation which is designed to prevent the acquisition or retention of a devised interest in land or in things other than land, in the event of any proceeding against the estate or interference with the management thereof is valid, except where the devisee acts *with probable cause* or succeeds with his proceedings against the estate, *in which case the restraint is invalid.* (Emphasis added.)

These principles are explained in illustration number 2 under this section:

A, owning Blackacre in fee simple absolute, makes an otherwise effective devise of the income thereof "to B for life, remainder to C and his heirs. It is my will that if any of my devisees shall interfere with my executors in the management of my estate, then and in that event, the share which such devisee would have taken is to be given to D." B, with probable cause, sues the executors alleging waste and mismanagement of Blackacre. The condition is invalid. B does not lose his estate for life.

²³ 135 F.2d 470 (D.C. Cir. 1943).

from the restraining influence of conditions like that here involved seems of little importance compared with enforcing the will of the testator that those who share in his bounty shall not have been guilty of besmirching his reputation or parading the family skeletons after his death.²⁴

In *Rossi v. Davis*²⁵ the Supreme Court of Missouri held that good faith and probable cause would not excuse a forfeiture under the no-contest provision in a trust instrument. "To engraft upon the condition thus distinctly expressed by the maker an exception not expressed nor reasonably implicable from the language of the instrument is to nullify the will of the maker, if in fact it be his will."²⁶ The court reasons that the no-contest clause does not preclude any beneficiary from seeking redress in the courts, but "every litigant takes and must take the chance to win or lose in a lawsuit."²⁷

To similar effect is the holding of the Supreme Court of California in *In re Miller*,²⁸ where the court stated that to allow an exception based on probable cause for the contest would "substitute our own views for a clearly expressed intent of the testator to the contrary. . . . It is a mere attempt at an artificial distinction to avoid the force of a plain and unambiguous condition against contests."²⁹ The Supreme Court of Michigan has similarly held in *Schiffer v. Brenton*³⁰ and other cases.

In a number of other states, including Texas, it is uncertain which line of decisions the courts will follow. There are two cases by the Texarkana Court of Civil Appeals, *Massie v. Massie*³¹ and *Perry v. Rogers*,³² in which the court decreed absolute forfeiture without referring to the matter of good faith and probable cause. In the *Massie* case the testator, treating land as his separate property, devised it equally to his children and provided that any child contesting the will should forfeit his right thereunder. The court held that where a child contested the will on the ground that testator had disposed of property belonging to his deceased mother, the child elected to recover as an heir of his mother and forfeited his right under the will. In the *Perry* case the facts are somewhat complicated. The will provided that "if at any time any beneficiary should attempt or

²⁴ *Id.* at 471, 473.

²⁵ 133 S.W.2d 363 (Mo. 1939).

²⁶ *Id.* at 372.

²⁷ *Ibid.*

²⁸ 156 Cal. 119, 103 P. 842 (1909).

²⁹ *Id.* at 843, 844.

³⁰ 247 Mich. 512, 226 N.W. 253 (1929).

³¹ 118 S.W. 219 (Tex. Civ. App. 1909).

³² 114 S.W. 897 (Tex. Civ. App. 1908).

should proceed in changing or breaking my aforesaid will, then it is my wish and desire that the half interest that I hold and possess in all my estate, both real and personal, be given and I hereby bequeath the same to my present wife for the benefit of my sons . . . of my present wife by me."³³ Suit was brought by children of the first marriage against other children of that marriage and the surviving wife and children of the third and fourth marriages for partition of the land devised. The court decreed that forfeiture would be enforced even as against a son of the third wife who did not initiate the action nor join in the attack on the will, stating:

That it was his intention that his surviving wife and their children should take his interest in the property to the exclusion of every other person, in the event the disposition made by him of the property should not be effective because not acquiesced in by one entitled to object thereto, we think was made as clear as language could evidence it. . . . The intention being plain, that to give it effect will operate to deprive devisees, innocent of any attack on his right to dispose of the property of the benefit it conferred upon them furnishes no reason why his will should not be enforced as he intended it should be.³⁴

In subsequent cases Texas courts have stated, at least as *dicta*, that forfeiture will not be decreed if good faith and probable cause for the contest exist. In *Calvery v. Calvery*³⁵ the action was to construe a will as to whether the legatee was vested with a life estate or fee simple. In the opinion by the commissioner of appeals it is stated: "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. . . . Our supreme court has never passed upon this precise question, and the view we take of this record renders a decision thereon in this cause unnecessary."³⁶ The court held that the suit was to construe the will, not to contest it: "We do not intend to declare whether a forfeiture would result from a suit merely to ascertain the intent of a testator, regardless of the contestant's good faith and regardless of the existence of probable cause for the institution of the suit. No such case is before us."³⁷

The Dallas Court of Civil Appeals, in 1937, considered the question in *First Methodist Episcopal Church South v. Anderson*,³⁸ which was a suit to construe the will. The court stated that forfeiture

³³ *Id.* at 898.

³⁴ *Id.* at 299.

³⁵ 122 Tex. 204, 55 S.W.2d 527 (Tex. Comm. App. 1932).

³⁶ *Id.* at 530.

³⁷ *Id.* at 530, 531.

³⁸ 110 S.W.2d 1177 (Tex. Civ. App. 1937).

should not result when a contest is made in good faith and upon probable cause,³⁹ but concluded that the suit was for the purpose of "interpreting" the will rather than one "to thwart the will of the testator."⁴⁰

In *Hodge v. Ellis*⁴¹ a suit to establish title to property was filed by the husband grantee when the wife in her will purported to convey the entire property as her separate property. The court concluded that the suit was one brought in good faith and upon probable cause (citing *Calvery*) to establish title and was not a suit to "thwart the will" of the testator, but if the latter were the intention of the suit, the forfeiture clause would be operative.

Thus this issue has not been decided in Texas. It remains for our supreme court to decide whether "good faith and probable cause" for the contest will avoid forfeiture or, on the contrary, afford no excuse for a violation of the condition in the will.

WHAT CONSTITUTES A CONTEST?

What constitutes a contest or opposition to the will or trust instrument violating the no-contest clause? The word "contest" as used in the forfeiture provision of a will or trust agreement means any legal proceeding which is designed to result in the thwarting of testator's wishes as expressed in his will.⁴² The word "contest" is not used in a technical sense, but means to make a subject of dispute, to litigate, to oppose, challenge, resist. For example, objections to probate of a will on the ground that its execution was obtained by fraud, undue influence, lack of testamentary capacity, etc.⁴³

The intention of the grantor controls, and whether there has been a contest of the will must be determined by the circumstances of each particular case. The particular wording of the no-contest clause is important.⁴⁴

It is not necessary to attack the entire instrument; any attack that will defeat the purpose of the testator as expressed in the will comes within the forfeiture clause.⁴⁵ It has even been held that a no-contest

³⁹ *Id.* at 1184.

⁴⁰ *Ibid.*

⁴¹ 268 S.W.2d 275 (Tex. Civ. App. 1954).

⁴² *In re Hite's Estate*, 155 Cal. 436, 101 P. 443 (1909); *In re Howard's Estate*, 63 Cal. App. 2d 9, 155 P.2d 841 (1945); *Hodge v. Ellis*, 268 S.W.2d 275 (Tex. Civ. App. 1954).

⁴³ *Moran v. Moran*, 144 Iowa 451, 123 N.W. 202 (1909); *In re Cocklin*, 236 Iowa 98, 17 N.W.2d 129 (1945). Annot., 5 A.L.R. 1370 (1920), 14 A.L.R. 609 (1921), 26 A.L.R. 764 (1922), 49 A.L.R.2d 174, 198 (1927).

⁴⁴ 98 C.J.S., *Wills* § 1003, at 509 (1957); *In re Cronin's Will*, 257 N.Y.S. 496 (1932), *aff'd*, 261 N.Y.S. 936 (1932); *Hodge v. Ellis*, 268 S.W.2d 275 (Tex. Civ. App. 1954).

⁴⁵ *Moran v. Moran*, 144 Iowa 451, 123 N.W. 202 (1909).

provision may operate against a devisee who did not take part in the contest.⁴⁶ It has also been held that the withdrawal of the contest, once filed, does not prevent the application of the forfeiture.⁴⁷ A number of actions are uniformly held to constitute contests. An attack on the mental capacity of the testator or grantor constitutes a "contest" within the meaning of the usual clause, whether or not the litigation assumes the traditional form of a will contest.⁴⁸

The courts have decided in a number of cases that certain actions do not constitute a "contest." The most frequent example is a suit for construction of the will or trust instrument, where the object of the suit is not to render the instrument void or to nullify any of its parts but rather to ascertain its true legal meaning.⁴⁹ Filing claims against the estate,⁵⁰ or claims of damages for breach of contract,⁵¹ are not contests. An action asserting the court's lack of jurisdiction of the probate proceedings on the ground that the testator was domiciled elsewhere has been held not to be a contest.⁵² Also an answer to a petition for probate which only questions whether the will was executed in accordance with the required statutory formalities is not a contest.⁵³ It has been held that an action against the executor for rents collected on land devised to plaintiff did not constitute a contest where the provision prohibited both direct and indirect contest of the will. "An indirect contest connotes as a minimum some affirmative action either by word or deed."⁵⁴ A proceeding to determine heirship has been held not to be a contest, as it is not an attempt to thwart the testator's wishes as expressed in the will.⁵⁵

Generally, an attack in good faith by a beneficiary on the administration of the estate by the executors or others concerned in its management does not constitute a contest or an attempt to defeat the will within the meaning of the forfeiture clause therein. This, of

⁴⁶ *Alper v. Alper*, 142 N.J. Eq. 547, 60 A.2d 880 (1948), including minors, *aff'd*, 12 N.J. 105, 65 A.2d 737 (1949).

⁴⁷ *In re Hite's Estate*, 155 Cal. 436, 101 P. 443 (1909); *In re Simpson's Estate*, 196 A. 451 (Prerog. Ct. on N.J. 1938); 5 Page, Wills § 44.29, at 475 (1962).

⁴⁸ *In re Hite's Estate*, 155 Cal. 436, 101 P. 443 (1909); *In re Cronin's Will*, 143 Misc. 559, 257 N.Y.S. 496, *aff'd*, 261 N.Y.S. 936 (1932); *Tate v. Camp*, 147 Tenn. 137, 245 S.W. 839 (1922), and cases cited therein.

⁴⁹ *Tate v. Camp*, *ibid.*; *Calvery v. Calvery*, 122 Tex. 204, 55 S.W.2d 527 (Tex. Comm. App. 1932); *Hodge v. Ellis*, 268 S.W.2d 275 (Tex. Civ. App. 1954); 5 Page, Wills § 44.29, at 473 (1962).

⁵⁰ *Kolb v. Levy*, 104 S.2d 225 (Fla. Civ. App. 1958); *Wright v. Commins*, 108 Kan. 667, 196 P. 246 (1921).

⁵¹ *Haley v. Pickelsimer*, 261 N.C. 293, 134 S.E.2d 697 (1964).

⁵² *Estate of Crisler*, 217 P.2d 470 (Cal. Civ. App. 1950); *Maguire v. Bliss*, 304 Mass. 12, 22 N.E.2d 615 (1939).

⁵³ *Scriven v. Scriven*, 153 Neb. 655, 45 N.W.2d 760 (1951).

⁵⁴ *Lavine v. Shapiro*, 257 F.2d 14 (7th Cir. 1958).

⁵⁵ *In re Spehar's Estate*, 367 P.2d 563 (Mont. 1961).

course, will depend upon the particular wording of the no-contest clause, which might include a prohibition of such actions.⁵⁶ By maintaining or participating in an action or suit for an accounting or settlement of the estate, beneficiaries do not ordinarily violate provisions in the will prohibiting a contest.⁵⁷

The bringing of a suit for partition of property devised in the will has been held not to constitute a contest or attempt to defeat the provisions of the will. In *Bethburum v. Browder*⁵⁸ it was held that a devisee by filing a suit seeking partition in kind did not forfeit the bequest, notwithstanding a provision in the will that the devisees act in harmony with the executor, abide by the executor's decisions, etc. This decision may be in partial conflict with *Massie v. Massie*.⁵⁹

No general rule can be stated as to whether a party claiming title or an interest in the property independent of the will is thereby contesting the will violating the no-contest provision. A determination depends upon the particular facts and circumstances in the light of the provisions of the no-contest clause. In *Massie v. Massie*⁶⁰ and *Perry v. Rogers*⁶¹ the Texarkana Court of Civil Appeals held that the forfeiture resulted from an action of this nature. On the other hand, in *Hodge v. Ellis*⁶² the court held that the husband, in filing an action to recover his community interest which the wife sought to bequeath under her will as her separate property was only to ascertain title and did not violate the no-contest clause.⁶³

Appearing as or procuring a witness for the contestant does not constitute a violation of the no-contest provision where there is nothing to show that the beneficiary otherwise actively interested himself in furthering the contest.⁶⁴ However, there may be a violation of the clause when the beneficiary furnishes money to or agrees to reimburse the contestant.⁶⁵ Merely expressing or indicating a wish that the contestant be successful in the contest does not bring one within the prohibition of the no-contest provision.⁶⁶

⁵⁶ *Upham v. Upham*, 200 S.W.2d 880 (Tex. Civ. App. 1947); *In re Lavin's Estate*, 99 Cal. App. 586, 278 P. 925 (1929) *error ref. n.r.e.*; *Chew's App.* 45 Pa. 228 (1863); Annot. 49 A.L.R.2d 174, 218 (1927).

⁵⁷ *Upham v. Upham*, *ibid.*; *Cohen v. Reisman*, 48 S.E.2d 113 (Ga. 1948); and cases cited in Annot., 49 A.L.R.2d 174, 220 (1927).

⁵⁸ 216 S.W.2d 992 (Tex. Civ. App. 1948) *error ref. n.r.e.*

⁵⁹ 118 S.W. 219 (Tex. Civ. App. 1909).

⁶⁰ *Ibid.*

⁶¹ 114 S.W. 897 (Tex. Civ. App. 1908).

⁶² 268 S.W.2d 275 (Tex. Civ. App. 1954), *aff'd in part and reversed in part on other grounds*, 154 Tex. 341, 277 S.W.2d 900 (1951).

⁶³ See also *First Methodist Episcopal Church South v. Anderson*, 110 S.W.2d 1177 (Tex. Civ. App. 1937) *error dismissed*; and cases cited, Annot., 49 A.L.R.2d 174, 223 (1927).

⁶⁴ See Annot., 49 A.L.R.2d 174, 231 (1927).

⁶⁵ *Id.* at 232.

⁶⁶ *Id.* at 234.

ATTEMPT TO PROBATE A SUBSEQUENT WILL

An interesting question arises where a beneficiary under a will containing a no-contest provision offers or assists in the offering for probate of a subsequent will. No Texas case has been noted on this particular question. The authorities passing upon the question in other jurisdictions have made a distinction depending upon whether the subsequent will is believed by the beneficiary to be genuine or is known by him to be spurious.

Thus it is held that an attempt to probate a will which is spurious in fact but believed to be genuine does not render the petitioner subject to the forfeiture provisions of the no-contest clause of a prior will. The reason for such holding is set forth by the Supreme Court of California in *Bergland*:⁶⁷

[I]t may be worthy of note that to hold that the testator intended to forbid under penalty any attempt to probate what was genuinely believed to be a later will would mean that he intended decidedly to limit his own freedom of subsequent testamentary action. Such penalty would seriously discourage any attempt to probate even a genuine later will, and would distinctly lessen the chance of any later testamentary expression by the testator being made effective. It is not to be presumed that he contemplated or intended any such consequence.⁶⁸

Likewise, the New York court held in the case of *Kirkholder's Estate*⁶⁹ that a legatee does not forfeit his legacy by presenting for probate an alleged later will which is denied probate, provided he acts in good faith with probable cause to believe that such later instrument is genuine. The court said that if the testator did in fact make such later will and the legatee had possession of it and had no reason to doubt its genuineness and legality, it would be such legatee's duty to offer it for probate, where such legatee is named in it as executor; and it would be against public policy to subject him to a penalty or forfeiture for doing what it was his duty to do.

On the other hand, an attempt by a beneficiary to probate a subsequent will known by him to be false would come within the no-contest clause of the prior will.⁷⁰ It is submitted that the reasoning in the above cases is sound. If from the facts and circumstances the subsequent will appears to be genuine, the offering of it for probate by a beneficiary does not violate the no-contest clause of a prior will, where the subsequent will is not granted probate. On the other

⁶⁷ 180 Cal. 629, 182 P. 277 (1919).

⁶⁸ *Id.* at 280.

⁶⁹ 157 N.Y.S. 37 (1916).

⁷⁰ *In re Bergland*, 180 Cal. 629, 182 P. 277 (1919); *In re Mathie's Estate*, 64 Cal. App.2d 767, 149 P.2d 485 (1944).

hand, if the subsequent will is known to be spurious or the beneficiary offering it should have known the same, the offering of the subsequent will seeking to revoke the prior will constitutes a contest of the former will and makes the forfeiture clause applicable.

USE OF DECLARATORY JUDGMENT PROCEDURE

In view of the uncertainties as to whether the proposed action will be considered a "contest" of the will or trust instrument and also as to whether good faith and probable cause for contesting exist or will avoid a forfeiture, the beneficiary is often in a dilemma as to what action, if any, to take. In these circumstances recourse has been had to the bringing of a suit to construe the will and for a declaratory judgment as to the effect of the proposed action, in light of the no-contest provision. This type of action was brought in the case of *Bethurum v. Browder*.⁷¹ The beneficiary sought to have the court construe the will and enter a declaratory judgment as to the effect of the devisee's seeking an action to have certain property partitioned in kind. The will specified that a devisee refusing to abide by the decisions of the independent executor would forfeit the bequest. The court held that under the terms of the statute providing for declaratory relief, the court had the power and duty to render judgment declaring the rights of the plaintiffs, in light of the no-contest clause, and the duties and powers of the executor.

The Uniform Declaratory Judgment Act⁷² provides that an action may be brought by any person interested as or through an executor, trustee, devisee, heir, etc. who may have a declaration of rights or other legal regulations, to determine any question arising in the administration of an estate or trust, including any questions of construction of wills and other writings (section 4); and to direct executors, administrators to do or refrain from doing any particular act in their fiduciary capacity.

In *Coben v. Reisman*⁷³ a declaratory judgment action was brought to determine whether a beneficiary would violate the *in terrorem* clause by bringing an action seeking to show that the executor had wrongfully withheld from her certain assets going to her under the will. The requested relief was granted, the court stating:

Here is an unquestionable justiciable controversy where there is uncertainty and insecurity with respect to rights of the litigant as to whether she would forfeit her rights under the will by bringing an

⁷¹ 216 S.W.2d 992 (Tex. Civ. App. 1948) *error ref. n.r.e.*

⁷² Tex. Rev. Civ. Stat. Ann. art. 2524-1 (1965).

⁷³ 48 S.E.2d 113 (Ga. 1948).

action of the character indicated. It follows from what has been said that the instant case comes clearly within the purview of the declaratory judgment act, and the trial court properly overruled the general demurrer attacking the petition on this ground.⁷⁴

DRAFTING OF NO-CONTEST PROVISION

Since the forfeiture provision is to be construed strictly, it is important that the no-contest clause be drafted carefully to cover the conditions and contingencies intended by the testator or grantor. No particular form or language is necessary; any language by which testator makes his intentions clear is adequate. "Anyone breaking this will is debarred from same, with the payment of \$5.00" was held good against contest.⁷⁵

The no-contest provision may cover only a direct attack or contest of the probate of the will or the enforcement of the trust. If, however, the testator or grantor intends that the condition should be more comprehensive, language should be used to express adequately and fully such intention. The following suggest some of the points that the testator or grantor may desire either to include or exclude from the statement of the no-contest provision:

1. Direct or indirect contest of the probate of the will or the enforcement of the trust instrument, or any part thereof.
2. An objection or opposition to the carrying into effect of any separate part, provision or declaration contained in the will or trust agreement.

⁷⁴*Id.* at 114. To the same effect is *Dravo v. Liberty Nat'l Bank & Trust Co.*, 267 S.W.2d 95 (Ky. Civ. App. 1954).

In *Boswell v. Hadley*, 397 S.W.2d 213 (1965), beneficiaries of certain testamentary trusts sued the co-trustees and others, seeking to have the will construed and a declaratory judgment entered in answer to these questions:

1. Would an action in good faith to surcharge the former independent executors for breaches of trust, collusion, negligence in administration of the estate, etc. constitute a contest of the will under the no-contest provision?
2. Would an action in good faith to remove the co-trustees for wrongful acts constitute such contest?
3. Would an action seeking a construction of the administrative or other provisions of the will constitute a contest?

The plaintiffs expressly disclaimed any intention to contest the validity of the will. The no-contest provision was comprehensive and covered the contest of the probate or question of any part of the will or any aid in any manner of a contest. The Tyler Court of Civil Appeals reversed and remanded the cause because no sworn or certified copy of the will was attached to the petition. *Hadley v. Boswell*, 386 S.W.2d 300 (Tex. Civ. App. 1965).

The supreme court likewise *decided the case* on this procedural ground and thus never considered whether the use of a suit for construction and for declaratory judgment affords an appropriate proceeding to secure a prior determination of whether a party can safely proceed against the independent executors and trustees without thereby bringing a contest. Neither did it determine whether an action brought in good faith and with probable cause presents a case of contest violating the no-contest provision. So for the time being these questions remain unanswered.

⁷⁵*Andrew's Ex'x v. Spruill*, 271 Ky. 516, 112 S.W.2d 402 (1937).

3. Such indirect opposition to the will or trust instrument as giving aid or assistance to others who contest.

4. The use of any means of defeating testator's intention or thwarting his will.

5. The expression of dissatisfaction by the legatees or beneficiaries in the provisions of the will, and requiring them to "acquiesce" in the provisions of the instrument.

6. Requiring the legatees or beneficiaries to oppose or join in seeking to defeat any contest or opposition to the will or trust instrument.

7. Requiring that the beneficiary who contests or opposes the will or trust instrument be required to pay the expenses of litigation, the cost of administration incurred thereby, and other costs.⁷⁶

Various contingencies that arise in drafting a no-contest provision are illustrated by this example. The client states that he wants his will "fixed so that it can't be broken"; that he "doesn't want any fuss, litigation, fighting or contest of any kind over my estate"; that he does not want his "executor to have any trouble, argument, or controversy with anybody"; and that "if anybody tries to break my will, or interfere with my executor in settling my estate, I want to cut him off without a cent." Presented with a request like this, the draftsman proceeds to prepare the strongest possible no-contest clause. The following provision might be prepared:

ARTICLE _____:

I earnestly ask my beneficiaries, devisees and legatees, in harmony and in all things, to aid my executor in carrying out my wishes as expressed in this Will. In order to insure this, it is my will, and I herenow expressly provide, and make it a condition precedent to the taking, vesting, receiving or enjoying of any property, benefit or thing whatsoever under and by virtue of this will, that the beneficiary, devisee and legatee shall accept and agree to all of the provisions of this will, and the provisions of this Article are made an essential part of each and every benefit in and under said Will. If any beneficiary, devisee or legatee hereunder, directly or indirectly, individually or with another, shall contest the probate or validity of this Will, or any provision thereof; or shall institute or join in (except as a party defendant) any proceeding to contest the validity of this Will or to prevent any provision hereof from being carried out in accordance with its terms; or shall fail to acquiesce therein, or shall fail or refuse to defend this Will or any

⁷⁶ Guaranty Trust Company v. Blume, 92 N.J. Eq. 538, 114 A. 423 (1921).

provision herein; or shall in any manner question or dispute any statement or declaration herein; or shall in any manner aid, assist or encourage another in any such contest or questioning; or contests, questions or opposes in any legal proceeding the performance by the executor of any duty, act or discretion granted to or incumbent upon him under the terms of this Will or by law: then in any such contingency all benefits provided for such beneficiary, devisee or legatee are revoked and such benefits shall pass to the residuary beneficiaries of this Will (other than such beneficiary) in the proportion that the share of each such residuary beneficiary bears to the aggregate of the effective shares of the residuary. If all of the residuary beneficiaries join in such contest or proceeding, or engage in the prohibited act or acts, then such benefits shall pass to those persons (other than the persons joining in such contest) who are living at my death and who would have been my distributees had I died intestate a resident of the State of _____, and had the person or persons contesting my Will died immediately before me. If all beneficiaries herein and all heirs at law so act to incur the penalty of forfeiture, I give such benefits and properties to A (preferably a charitable institution). Anyone violating in any manner this provision shall pay all costs and expenses of litigation, administration and other costs, including attorney's fees. It is my express intention and desire that in the event of the violation of the provisions of this Article in any respect, the respective benefits shall be revoked and forfeited regardless of whether or not the beneficiary, devisee or legatee violating the same instituted the proceedings, performed the particular act of violation, or failed to act as herein required in good faith and with probable cause.

It is not suggested that the courts have or would necessarily enforce each and all of the provisions mentioned in the above no-contest provision. But, in any event, it should not be difficult for the courts to understand therefrom the intention of the testator. If, nonetheless, the court concluded not to decree forfeiture, resort would probably have to be made to public policy or some similar line of reasoning.

CONCLUSION

The no-contest clause should not be inserted in wills promiscuously or as a matter of form. With a proper understanding of the testator's or grantor's situation, the existence of causes that might give rise to family differences, the natural objects of his bounty, the intended

recipients of his estate and other related facts the draftsman should be able to determine the need and desirability of using a no-contest provision. If the situation calls for the use of such provision, the extent and scope of the testator's intention in regard thereto should be ascertained and then implemented accordingly.

It is suggested that the responsibility of the draftsman does not extend merely to include or not include a no-contest provision. He should consider and explore with the client the desirability and propriety of making the will or trust in a manner that will be fair, reasonable and adequate, consistent with the latter's considered wishes and desires, but also fair and reasonable to the beneficiaries. Where a will contains unnatural, arbitrary and unfair provisions under the circumstances, litigation and controversy will often ensue regardless of the provision as to contest.

Where the party has real fear or apprehension as to contest by a particular beneficiary, it is important that the bequest in the will be of an amount that will place the risk of choice upon the beneficiary. Where the bequest is of a nominal amount or value, the no-contest clause will not be a real deterrent to contest, since the beneficiary will have little to lose by contesting. It is desirable that the bequest be of sufficient amount or value so that the risk of forfeiture, in the event of failure, will present a real deterrent.

Summarizing, the no-contest clause has been held valid and not against public policy, at least where there is a gift over in the event of breach. Where there is no gift over upon breach, the English courts hold that the condition is valid as to devises of land but not as to personalty. Although some courts in the United States follow the English rule, most jurisdictions uphold the validity of the condition, whether there is a gift over or not, and whether the property is realty or personalty.

The courts are divided as to whether forfeiture will be enforced where the contest was instituted in good faith and with probable cause, with each side claiming to have "the weight of authority." In many jurisdictions this exact question has not been specifically decided.

It is often difficult to determine whether the particular action or proceeding constitutes a "contest," or violation of the provision in the instrument. Where the beneficiary is not certain as to what action, if any, he may safely take, recourse may possibly first be had to a suit to construe or for declaratory judgment to determine the effect of the contemplated action.

In the final analysis the no-contest clause should be sparingly used and carefully phrased to cover the particular situation and circumstances of the testator or grantor and should be limited to his considered intentions. Litigation may often be avoided by drawing instruments in the light of fair, reasonable and equitable principles rather than with arbitrary, punitive and capricious designs.