

WHAT TO DO FOR A CLIENT WHO EXPECTS A WILL CONTEST

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I. SCOPE OF THIS ARTICLE

For most of our clients, their Will is the most important document they will sign during their lifetimes. Accordingly, our duties as estate planning attorneys are to prepare and carry out the execution of our clients' Wills in a manner that, first and foremost, will prevent or discourage a Will contest from being brought and, secondarily, if a contest is brought, to have taken the necessary steps so that the contest will be defeated. In exploring the measures that can be taken in fulfilling our duties, this article assumes that most of you are like this author, i.e. you're either an estate planning and probate attorney or, at the least, estate planning and probate is a substantial part of your practice - and you're not a litigator. The author further assumes that, if you're presented with a client situation where a Will contest is likely, you will take the minimum necessary steps to make sure that the Will is executed properly and appropriate measures will be taken to properly safeguard the Will so that it will not be altered, destroyed, etc. . . .

At the outset it should be pointed out that the preparation of this article included the review and reference to several excellent articles on the same or related topics cited in the bibliography prepared by some fine Houston lawyers, e.g. Mike Cenatiempo, Stephanie Donaho, John Hopwood, and Joe Horrigan.

II. COMMON GROUNDS FOR CONTESTING A WILL

A. Improper Execution.

1. Obviously, a Will that is not executed with the requisite formalities is not a valid Will and may not be probated. Section 59 of the Texas Probate Code contains three requirements for the proper execution of a Will: (i) it must be signed by the testator or for him at his direction and, except for holographic Wills (i.e. - entirely in the testator's own handwriting), (ii) the Will must be attested by two or more credible witnesses over 14 years of age who subscribe their names thereto, and (iii) the witnesses must sign the Will in the presence of the testator. Of course, a Will should normally have an "attestation clause" preceding the witnesses' signatures reciting that the execution requirements have been satisfied (e.g. - "The undersigned persons hereby sign

their names to the foregoing Will in the presence of the testator, etc."), but no such clause is required.

A "credible witness" is synonymous with a "competent witness", who is defined as "a witness competent under the law to testify to the fact of the execution of the Will. See *Moos v. First State Bank*, 60 S.W.2d 888 (Tex. Civ. App. 1933, writ dismissed w.o.j.)

The testator is not required to sign the Will in the presence of the witnesses; however, the witnesses must sign the Will in the presence of the testator. For these purposes, Texas cases interpret the term "in the presence of the testator" to mean actual presence or "conscious presence". In *Morris v. Estate of West*, 643 S.W.2d 204 (Tex. App - Eastland 1982, writ refused n.r.e.), the Court held that the witnesses were not in the presence of the testator when they signed the Will in a secretarial office while the testator remained in a conference room down the hallway.

B. Testamentary Intent.

1. In order to be a valid Will, it must be executed in accordance with the foregoing statutory requirements and, in addition, the testator must have "testamentary intent", which is not a statutory requirement, but a long standing principle of case law. Basically, a testator must intend to create a revocable disposition of his property to take effect after his death. Further, "it is essential, however, that the maker shall have intended to express his testamentary wishes in the particular instrument offered for probate". See *Hinson v. Hinson*, 280 SW.2d 731 (Tex. 1955). Accordingly, a testator with testamentary intent should not be questioned regarding an instrument in the general form of a Will and clearly labeled as such.

C. Testamentary Capacity

Section 57 of the Texas Probate Code requires that a testator must be "of sound mind" in order to have the right and power to make a Last Will and Testament. The sound mind requirement essentially means having "testamentary capacity." The five part test for testamentary capacity laid out in *Prather v. McClelland*, 13 S.W.2d 543 (Tex. 1890) is still the current rule, and essentially requires that the testator must have been capable of understanding the following:

- a. The business he was engaged in;
- b. The nature and extent of his property;
- c. The persons who were the objects of his bounty;

- d. The effect of his making the Will and thereby distributing his property among such persons; and
- e. "Memory sufficient to collect in his mind the elements of the business to be transacted, and to hold them long enough to perceive, at least, their obvious relation to each other, and be able to form a reasonable judgment as to them."

More recent cases have consistently followed the test laid out in *Prather v. McClelland* and frequently repeated the text almost verbatim. See *Teiken v. Midwestern State University*, 912 SW.2d 878 (Tex. App.- Fort Worth 1995, no writ); *Oeschner v. Ameritrust*, 840 SW.2d 131 (Tex.App. - El Paso 1992, writ denied).

The testator's testamentary capacity on the day the Will is executed is all that is required for the Will to be valid. See *Croucher v. Croucher*, 660 S.W.2d 55 (Tex. 1983). However, evidence of incapacity at other times is generally relevant, but admissible only if it demonstrates that the condition persists and has some probability of being the same condition which obtained at the time of the Will's making. *Lee v. Lee*, 424 S.W.2d 609 (Tex. 1968).

Even though the general requirements of testamentary capacity listed above are satisfied, a Will may still be held invalid on the basis of an "insane delusion." In *Lindley v. Lindley*, 384 S.W. 2d. 676 (Tex.1964), the court indicated that a person who is entirely capable of attending to his business affairs may have his mind so warped by some false and unfounded belief that he is incapable of formulating a rational plan of testamentary disposition. Accordingly, even though a testator otherwise is of sound mind, a Will may be denied probate if it was the product of an insane delusion, which has been defined as " the belief of a state of supposed facts that do not exist, and which no rational person would believe." See *Knight v. Edwards*, 264 S.W.2d 692 (Tex. 1954). Further, the insane delusion must affect the provisions in the Will in order for the Will to be invalidated. See *Bauer v. Estate of Bauer*, 687 S.W. 2d. 410 (Tex. App.- Houston [14th Dist.] 1985, writ ref d n.r.e.).

D. Undue Influence

The Texas Supreme Court, in *Rothermel v. Duncan*, 369 SW.2d 917 (Tex. 1963), listed the following legal requirements for proving the existence of undue influence and thereby invalidating a Will: "(1) The existence and exertion of an influence; (2) the effective operation of such influence so as to subvert or overpower the mind of the testator at the time of the execution of the testament; and (3) the execution of a testament which the maker thereof would not have executed but for such influence It cannot be said that every influence exerted by one person on the will of another is undue, for the influence is not undue unless the free agency of the

testator was destroyed and a testament produced that expresses the will of the one exerting the influence."

While the elements needed to prove undue influence may be shown by circumstantial as well as direct evidence, evidence that merely shows the opportunity to exert influence, the testator's susceptibility to influence due to age and physical condition, and an unnatural disposition, do not establish that the testator's mind was in fact subverted or overpowered. See *Estate of Woods*, 542 SW.2d 845 (Tex. 1976).

To support a jury finding of undue influence, there must be some proof that influence was in fact exerted, and that the testator's mind was subverted and overpowered at the time the Will was executed. See *Estate of Davis*, 927 SW.2d 463 (Tex. App. - Amarillo 1996, writ denied).

E. Revocation

Section 63 of the Texas Probate Code essentially provides that there are two ways to revoke a Will, i.e. (i) "by a subsequent Will, Codicil, or declaration in writing, executed with like formalities" or (ii) "by the testator destroying or cancelling the same, or causing it to be done in his presence." Of course, the normal way to revoke a Will is by executing a new Will containing a standard revocation clause, e.g. - "I hereby revoke all previous Wills and Codicils."

The requirement that a written revocation of a prior Will must be "executed with like formalities" simply requires that the revoking instrument be executed with the same formalities that are required to probate a Will. See *Harkins v. Crews*, 907 SW.2d 51 (Tex. App. - San Antonio 1995, writ denied). Accordingly, to revoke a Will, the testator must have testamentary capacity at the time the subsequent instrument of revocation is executed. Otherwise the, attempted revocation is without effect. See *Lowery v. Saunders*, 666 SW.2d 226 (Tex. App. - San Antonio 1984, writ ref d n.r.e.).

Revocation of a Will by physical act requires both the act itself and the intent to revoke the Will. The physical act of revocation must be of the Will itself, not some other document. Thus, where a testator tore up an envelope and its contents, mistakenly believing that the Will was inside, the Will was not revoked. "The mere intention to destroy a Will, or the intention to have it destroyed, coupled with the belief that destruction has occurred, is insufficient to effect revocation." See *Morris v. Morris*, 642 SW.2d 448 (Tex. 1982). Further, a testator may not partially revoke certain provisions in an attested Will by erasure, cancellation or other obliteration of a specific clause. The strike out is ignored and the Will is admitted to probate as it was originally executed. See *Leatherwood v. Stephens*, 24 SW.2d 819 (Tex. Comm. App. 1930).

If a testator validly revokes a Will with a revocation clause with the intention of reviving or restoring an earlier Will, Texas applies the common law "no revival" rule, meaning the earlier Will is not revived merely by destroying the later Will with its revocation language. In other words, the earlier Will was revoked when the later Will was executed. See *Hawes v. Nicholas*, 72 Tex. 48 1, 10 S.W. 558 (1889).

F. Mistake

Generally, a Will may be held invalid on the grounds that it was induced by a testator's mistake in the factum (i.e. - mistake in the execution) or a mistake in the inducement. A mistake in the factum by the testator occurs when (i) the testator mistakenly signs his Will when he thinks he is signing some other instrument or (ii) when there is a mistake in the contents of the document signed by the testator.

A mistake in the inducement occurs when the testator is induced to sign the Will by his mistaken belief as to an extrinsic fact, such as whether an intended beneficiary is alive, the occurrence of a particular event, etc. . . .

G. Fraud

A Will may be denied probate on the basis of fraud if the testator was induced to sign the Will by deception or misrepresentation. See *Vickery v. Hobbs*, 21 Tex. 570 (1858); *Stolle v. Kanetzky*, 259 S.W. 657 (Tex.Civ.App.- Austin 1924, no writ).

Fraud is similar to mistake and can involve a misrepresentation to the testator in the factum or in the inducement. For example, fraud in the factum occurs when the testator is deceived as to the identity or contents of the instrument being executed. Further, fraud in the inducement occurs when some extrinsic fact is intentionally misrepresented to the testator, who otherwise would not have executed the Will.

H. Forgery

Obviously, a Will which has been forged, in whole or in part, will be held as invalid and denied probate if the contestant to the Will can prove that forgery occurred. "Forgery" in the context of a Will contest is not limited to the forgery of the signature of the testator or one of the purported witnesses, but can also include an alteration or substitution of pages of the document.

I. Duress

Under Texas case law, duress appears to be a form of undue influence. For duress to be present, it would appear that there must be an exertion of unlawful threats or coercion sufficient to preclude a person from exercising his own free will, thus inducing the person to do an act which he would not have otherwise done. See *Lawler v. Speaker*, 446 SW.2d 888 (Tex. Civ. App. - Amarillo 1969, writ ref'd n.r.e.).

III. PROTECTING THE WILL AND ESTATE PLAN

The time for estate planning attorneys to begin thinking about measures to prevent or discourage a contest of our client's Will and estate plan is at the outset of our engagement. If a Will contest appears to be a possibility, then from that point forward we should be mindful of procedures that will discourage a contest from being brought. Perhaps a good rule of thumb in that situation is to adopt a litigator's mind set and be conscious of how various steps taken will appear to a judge and jury. One of the primary considerations is whether or not to include a no-contest provision in the client's Will and/or living trust agreement - and that subject is addressed in Part IV of this article. Other procedures to consider include the following:

A. Prior to Execution

After the initial estate planning meeting with a client, the attorney should have some indication of whether or not the client's estate plan may result in a Will contest following his or her death. For example, some of the factors likely to provoke a Will contest include (i) an unusual disposition of property, (ii) unequal treatment or omission of family member(s) from the Will and estate plan, (iii) the client's remarriage and second family, (iv) any unusual behavior by the client, and/or (v) the client's physical or mental illness. In any of these situations, if not in every client situation, the attorney should prepare a memorandum summarizing his initial and all subsequent estate planning conferences with the client. Further, it would be wise for the attorney to request that the client prepare a letter in his own handwriting addressed to the attorney summarizing the client's dispositive wishes regarding his Will and estate plan. In that letter, the client should also include his reasons for any omission of family members or any unusual testamentary dispositions; however, the attorney should caution the client to not include any possible slanderous statements.

B. Careful Selection of Witnesses

One of the most crucial considerations in preventing or defeating a possible Will contest will be the determination of the witnesses to the execution of the client's Will. Accordingly, careful

consideration should be given to the selection of the witnesses, keeping in mind the likelihood that they will also be called as witnesses in the event of a Will contest. Accordingly, bear in mind how the witnesses will come across to the judge and the jury in the event that a Will contest lawsuit is filed.

Generally, individuals who have known or been associated with the client for a long period of time will make the best witnesses. Examples include long time family friends, business associates, bankers, and professionals, such as CPAs. The attorney might also consider having an extra third witness at the Will signing ceremony.

C. Strict Observance of Will Execution Requirements

The attorney should carefully explain, conduct and supervise the Will signing ceremony. Further, the Notary should swear in the testator and the witnesses before asking them the questions called for in the self-proving affidavit. Obviously, this is not the time to take any shortcuts regarding the execution of the Will and compliance with the self proving affidavit - and do not even consider mailing the finalized instruments to the client with execution instructions.

D. Video Tape of Will Signing Ceremony

Obviously, if the client's physical appearance and mental state are satisfactory, a videotape of the Will signing ceremony can be a powerful deterrent to a Will contest or provide dramatic evidence for the proponent if a contest is brought. However, because taping the ceremony can sometimes backfire, the decision to videotape the ceremony in any client situation should be made by the attorney only after careful consideration of all the circumstances. As pointed out by Mike Cenatiempo in his excellent article which is cited in the bibliography, "serious thought should be given to the following factors: age, physical appearance, demeanor and any physical impairments of the testator, such as severe hearing loss or poor eye sight." Ultimately, the decision of whether or not to tape the Will signing ceremony is a judgment call that the attorney must make.

If the decision is made to tape the execution ceremony, then common sense dictates that the attorney should retain a professional firm who handles the taping of Will signing ceremonies on a regular basis.

As far as the ceremony itself, Mike Cenatiempo points out in his article that a rehearsal of the ceremony can be helpful to avoid any confusion or surprises. The attorney should conduct the ceremony and, in addition, have the client briefly explain any unusual disposition of his property pursuant to the client's estate plan. In explaining his reasoning or logic, the client should be

careful not to libel anyone. Further, before concluding the taping session, the attorney should also obtain the witnesses' impressions of the client's testamentary capacity.

E. Transcription of Will Signing Ceremony

If a client's physical appearance is not suitable for video tape, the attorney should consider hiring a court reporter to transcribe the Will signing ceremony. Unlike video tape, a typed transcription of the Will signing ceremony will not necessarily reveal the client's physical appearance and/or impairments at the time that the Will is signed. If the attorney chooses to hire a court reporter to transcribe the will signing ceremony, the attorney should follow the same suggested course of action which is recommended above for video taping the Will signing ceremony (e.g. - retain a professional court reporter to transcribe the ceremony, have the client briefly explain any unusual disposition of his property pursuant to the client's estate plan, have the witnesses share their impressions of the client's testamentary capacity with the court reporter so that the witnesses' impressions will be included in the transcript, etc...). Unlike a video tape of a will signing ceremony, a transcript of a will signing ceremony that is prepared by a professional court reporter will not record or reflect long pauses by the client or the witnesses as they share any or all of the information which is discussed above.

F. Follow-up Measures

Immediately following the Will signing ceremony, the attorney should consider having each of the witnesses prepare and sign a brief memorandum summarizing their observations and recollections of the ceremony, as well as the testator's competency, appearance and frame of mind. In addition, the attorney should prepare a memorandum to the client's file regarding the same matters.

G. Family Communication

In situations where a client desires to dispose of his or her property in an unequal manner, verbal communications from the client to the affected family member could go a long way toward preventing a potential Will contest after the client's death. However, as pointed out in Stephanie Donaho's excellent article which is cited in the bibliography, "most clients are highly reluctant to do this, preferring to let someone else clean up their mess. They wish to avoid controversy while they are alive." Nevertheless, the attorney should encourage the client to at least consider writing a letter to be opened after the client's death briefly summarizing the dispositive provisions of his or her estate plan, as well as the client's logic or rationale for any unequal treatment or omission of family members. Further, the client should indicate in the letter that he reached his decisions after long and careful consideration.

H. Disposition of personal Effects and Other Tangible Personal Property

Surprisingly, the division and allocation of a decedent's personal effects and other tangible personal property often creates controversy among the donees, especially where the decedent's Will provides for a class gift of these items. In those instances, the friction usually arises over (i) the manner of selection of the items among the class of donees, (ii) the valuation of the various items and (iii) questions over whether or not the decedent gifted any such items during lifetime to a particular donee. Various measures in a client's estate plan can be implemented to go a long way toward avoiding this type of controversy. For example, the client's Will can list the various items and their recipients or, alternatively, it can refer to a memorandum prepared by the client which lists the various items and their recipients. In addition, the Will could spell out the manner of selection of items among the class of recipients (e.g. the first item to be selected by the oldest child, the next item to be selected by the next oldest child, etc...). Further, the Will should provide that if the donees are incapable of making a division among themselves for any reason, then the executor shall determine the division of those items in some equitable manner.³

I. Gifts During Lifetime

Lifetime gifting while a client still has all of his or her mental capacity can reduce the potential for a Will contest by removing those assets from the client's testamentary estate. Further, a gift to a potential contestant of the client's Will sometime near the date the Will is signed can be significant in upholding the validity of the Will in the case of a later contest. As pointed out in Mike Cenatiempo's article, the potential contestant's acceptance of such a gift would serve at trial as evidence of his belief that the testator had capacity at that time. As further pointed out by Mike Cenatiempo, if such a gift is made with a check from the client, the cancelled check would be proof of the contestant's acceptance of the gift.

J. Mental Status Exam

Referring the client to a psychiatrist or neurologist for a mental competency exam is a measure sometimes taken in an attempt to prove a testator's competency. However, caution should be exercised before having a client undergo an exam because clearly a contestant in a later Will contest could argue that the mental competency exam clearly shows that there must have been doubts regarding the client's mental capabilities on the part of the estate planning attorney at or about the time that the Will was prepared. Whether or not to have this exam performed in an effort to thwart a potential Will contest is another judgment call that the attorney must make.

Obviously, if the decision is made for the client to have a mental status exam, it should be done as near as possible to the date that the client signs his estate planning documents.

If a client has serious physical problems but his or her mental capabilities are sound, then a competency exam could be an effective means of demonstrating the client's testamentary capacity.

K. Series of Wills

An effective technique to make a potential contestant's task more difficult is to have the client execute a series of Wills over time with fairly minor changes. By doing this, a contestant must successfully prevent the admission to probate of the latest and all prior Wills to reach intestacy or an earlier more favorable Will.

In Mike Cenatiempo's article, he suggests a shrewd variation of this technique combined with "baiting" the no contest provision. "Assuming the testator will agree to bait the in terrorem provision, the testator can embellish this idea with each successive Will by providing the contestant with a larger bequest or devise. If the most current Will is denied admission, the prior Will takes effect and grants the contestant even less." If the client is willing to make a small but nevertheless significant bequest to the potential contestant, a series of baited Wills might be sufficient to discourage the contestant from challenging the client's estate plan.

L. Revocable Living Trust

Perhaps the best protection against a potential Will contest is to have the client establish a revocable living trust, which provides that the trust assets will be used liberally for the benefit of the client during his or her lifetime, with the remainder interest to pass to the client's intended beneficiaries at death. The client could serve as the sole trustee or as a co-trustee. In such event, the trust should be fully funded with the client's entire estate. Obviously, the longer the trust is in existence prior to the client's death, the better it reflects on the client's mental capacity. However, there are a number of other advantages which are afforded by a revocable living trust. For example, the trust instrument will not be a part of the public records and, in addition, the trust property will pass directly to the beneficiaries outside of the probate process following the client's death. Further, existing law is not clear regarding who has standing to contest a living trust and, in addition, the statute of limitations for challenging the validity of a living trust is unclear as well. As opposed to a Will contest, generally only the grantor of a trust or his or her representative can challenge a trust.

A poulover Will should always be used in conjunction with a revocable trust in case some of the client's assets are not conveyed to the trust prior to death. In addition, the pour over Will should include alternative dispositive provisions in case the living trust is held to be invalid. For example, it is not clear under current Texas law whether a grantor must have a higher level of mental capacity (i.e.-contractual capacity instead of testamentary capacity) to create a valid living trust.

To further bolster a living trust arrangement in a potential Will contest situation, a no-contest clause should be included in the provisions of the trust agreement. Based upon the few courts in other jurisdictions that have addressed the issue and the *Conte* case here in Texas cited in part IV.C.3 of this article, it appears that a no-contest provision in a trust agreement would be treated the same as a similar provision in a Will.

At some point consideration might also be given to amending the trust to make it irrevocable; however, in such an event, to avoid gift tax consequences the client should retain at least a testamentary special power of appointment in favor of those beneficiaries who will receive the trust property at the client's death.

M. Allocation of Litigation Expenses

As pointed out in Stephanie Donaho's article, an additional disincentive or an alternative to a no-contest clause in a Will or trust agreement would be a provision allocating all litigation expenses against a contestant's share or bequest and further providing that the contestant cannot be reimbursed for such expenses from the estate or trust. Such a provision might not appear to be as extreme as a no-contest clause, but nevertheless would be a substantial deterrent against challenges to the validity of a Will or trust agreement.

N. Diffuse Marital Property Issues

Especially for those who have remarried, the characterization of the various properties comprising a deceased client's estate can result in major disputes among the beneficiaries. In her article, Stephanie Donaho suggests a couple of procedures or measures for diffusing this issue. The first is to create an estate plan that should negate any issues regarding property characterization from arising between children of a first marriage and a second spouse. As an example, in a situation where a client desires to split the marital estate, with half passing to his or her spouse and the other half passing to children from the first marriage, the client could simply leave half of his or her separate property to the surviving spouse, with the residue going to the children; thereby achieving an equal division of the estate.

Other procedures or measures suggested by Stephanie Donaho include partition agreements and/or transmutation agreements pursuant to the Texas Family Code, especially where there has been substantial commingling of assets.

IV. NO-CONTEST CLAUSES

As indicated above, one of the first or primary considerations an estate planning attorney should present to a client who faces a potential Will contest situation is whether or not to include a no-contest clause (also called an in terrorem clause) in the client's Will or trust agreement. Even where family disputes are likely, many clients will not want to include a no-contest clause in their Wills, either because (i) the client believes that doing so would be an extreme measure or (ii) the client is unwilling to make the potential contestant a significant beneficiary under the Will, which is required for the in terrorem provision to be effective. Nevertheless, if properly structured, a no-contest clause can be a strong incentive for a potential contestant not to challenge a client's estate plan.

A. Typical Clause

The typical no-contest clause or in terrorem clause included in a Will essentially provides that if any beneficiary under the Will contests any provision of the instrument, then any share or interest in the testator's estate given to that beneficiary is deemed to be void and, further, the testator's Will is to be construed as if the contesting beneficiary had predeceased the testator. Accordingly, in order for a no-contest clause to be operative and effective, the client must make the potential contestant a fairly significant beneficiary under the Will.

The attorney should point out to the client that if a no-contest provision successfully prevents a Will contest or if the potential contestant brings an action but is unsuccessful, then the contestant's share of the client's estate might very well pass to the descendants of the contestant. This result might not be what the client desires. Accordingly, in structuring a no-contest provision, the attorney must determine whether or not the client wants to disinherit the descendants of a potential contestant.

B. Enforceability

There appear to be basically three positions among the states regarding the enforceability of no-contest clauses in the United States. First, there are two states, i.e.-Indiana and Florida, having statutes rendering no-contest clauses invalid. IND. CODE ANN. § 29-1-62 (West 1979); FLA. STAT. ANN § 732.517 (West 1995).

Second, the Courts in several states have held that no-contest clauses are valid with no exceptions. See, for example, *Rosi v. Davis*, 133 SW2d 363 (Mo. 193 9); *Elder v. Elder*, 120 A.2d 8 f 5 (R.I. 1956); *Dainton v. Watson*, 658 P. 2d 79 (Wyo. 1983).

Third, quite a number of states have recognized an exception to the enforceability of a no-contest clause where the contest was brought in good faith and with probable cause. As pointed out in the excellent law review article by Professor Gerry Beyer, et al. cited in the bibliography, those states that have recognized this exception by judicial precedent include Iowa, Kansas, North Carolina, Oregon, Pennsylvania, South Carolina, Tennessee, Washington, West Virginia and Wisconsin. Even more states have adopted by statute the good faith/probable cause exception to the enforcement of no-contest clauses. As cited in the article by Professor Beyer, et al., those states that have adopted the exception by statute include Alaska, Arizona, Colorado, Hawaii, Idaho, Maine, Marilyn, Michigan, Minnesota, Montana, Nebraska, New Jersey, North Dakota and Utah. It appears that this exception, whereby a no-contest clause is unenforceable if an action is brought in good faith and with probable cause, is also the Texas position.

C. Texas Position

Until 2009, Texas had no statute governing no contest clauses. In 2009, Section 64 of the Probate Code codified the good faith/just cause exception to provide the following:

A provision in a will that would cause a forfeiture of or void a devise or provision in favor of a person for bringing any court action, including contesting a will, is unenforceable if:

- (1) just cause existed for bringing the action; and
- (2) the action was brought and maintained in good faith.

TEX. PROB. CODE § 64. Since its enactment in 2009, there has been no case law construing Section 64 of the Texas Probate Code.

While it appears that a no contest clause can still be included in a Will, if the contestant shows just cause for contesting the will, and that the contest was brought and maintained in good faith, the no contest clause would be unenforceable. *See id.*

Prior to the adoption of Section 64 of the Texas Probate Code, many Texas courts have upheld the validity and enforceability of no-contest provisions where the contestant was challenging the dispositive provisions of the Will. See *Hammer v. Powers*, 819 SW2d 669 (Tex.App. - Fort

Worth 1991, no writ); *Massie v. Massie* 118 S.W. 219 (Tex. Civ. App. - 1909 no writ); and *Perry V. Rogers*, 114 S.W. 897 (Tex. Civ. App. - 1908, no writ).

1. **Good Faith/Just Clause Exception** – As stated above, the Texas Legislature codified the good faith/just cause exception in Section 64 of the Texas Probate Code. However, prior to the adoption of Section 64, no Texas case had ruled directly on the good faith/probable cause exception to enforcement of in terrorem clauses, but the exception has been mentioned favorably in dictum. See *Estate of Newbill*, 781 SW2d 727 (Tex.App. - Amarillo 1989, no writ); *Calvery v. Calvery*, 55 SW2d 527 (Tex. 1932).

Even if the good faith/probable cause exception applies, thereby allowing an unsuccessful contestant to still receive the property bequeathed to the contestant under the Will, the contestant has the burden at trial to prove, and there must be a finding by the trial judge or jury, that the contest was brought in good faith and with probable cause. See *Gunter v. Pogue*, 672 SW2d 840 (Tex.App.- Corpus Christi 1984, writ ref'd n.r.e.). Further, absent any pleading or proof that the contest was made in good faith and with probable cause, enforcement of the in terrorem clause cannot be avoided. See *Hammer v. Powers*, 819 S.W.2d 669 (Tex. App. - Fort Worth 199 1, no writ).

2. **Strict Construction** - Texas law appears to be clear that no contest clauses in a Will are to be strictly construed, forfeiture is to be avoided if possible, and only where the act of a party comes strictly within the clause may breach of the forfeiture provision be declared. See the *Estate of Hodges*, 725 S.W.2d, 265 (Tex. App. - Amarillo 1986, writ ref d n.r.e.). Accordingly, the primary question Texas courts have considered when presented with the application of no contest clauses has usually been whether or not the contestant's action was a "contest."

Texas Courts have strictly construed no-contest clauses and held that a contestant's actions did not trigger forfeiture pursuant to such clauses in the following cases:

1. Filing an application to probate a 1993 Will and, in the alternative, a 1991 Will. See *Estate of Foster*, 3 S.W.3d 49 (Tex.App. - Amarillo 1999, no writ).
2. Actions to construe a Will. *Calvery v. Calvery*, 55 SW.2d 527 (Tex. 1932) *Upham v. Upham*, 200 SW.2d 880 (Tex. Civ. App. 1947, writ refd n.r.e.).
3. The filing of a Will contest, which was dismissed prior to the Court hearing on procedural grounds, because the clause at issue did not specifically prohibit the

mere filing of the contest. See *Sheffield v. Scott*, 662 S.W.2d 674 (Tex. App. - Houston [14th Dist.] 1983 writ ref d n.r.e.).

4. Challenge by a beneficiary of the suitability of the person named in the Will for appointment as the independent executor. See *Estate of Newbill*, 781 S.W.2d 727 (Tex. App. - Amarillo 1989, no writ).
 5. An action for a declaratory judgment that a non-beneficiary executor had no standing to contest a family settlement agreement. See *Estate of Hodges*, 725 S.W.2d 265 (Tex.App. -Amarillo 1986, writ ref'd n.r.e.).
 6. An action against an executor alleging mismanagement of the decedent's estate. See *McClendon v. McClendon*, 862 S.W.2d 662 (Tex. App. - Dallas 1993, writ denied).
 7. An action against an executor seeking a final accounting, distribution and closing of an estate. See *Estate of Minnick*, 653 S.W.2d 503 (Tex. App. -Amarillo 1983, no writ).
3. **Application to Trusts.** –Section 112.038 of the Texas Trust Code was simultaneously amended in 2009 to codify the good faith/just cause exception relating to trusts. Section 112.038 contains language identical to Section 64 of the Probate Code relating to no contest clauses in Wills, and provides as follows:

A provision in a trust that would cause a forfeiture of or void an interest for bringing any court action, including contesting a trust, is unenforceable if:

- (1) just cause existed for bringing the action; and
- (2) the action was brought and maintained in good faith.

TEX. PROP. CODE § 112.038.

There is generally a lack of case law dealing with the issue of no-contest clauses in trust agreements; however, those courts that have addressed the issue have generally treated no-contest clauses in trust agreements in the same manner as no-contest provisions in Wills. See, for example, *Poag v. Winston*, 241 Cal. Rptr. 330 (Ct. App. 1977); *Haynes v. First National State Bank of New Jersey*, 432 A.2d 890 (N.J. 1981). In a recent Texas case, the appellate court held that an action by a co-trustee to remove another co-trustee

did not violate the in terrorem provisions in the trust agreement. *See Conte v. Conte*, 56 S.W.3d 830 (Tex. App. -Houston [1st Dist.] 2001, no writ).

In the *Conte* case, a sister wanted to remove her brother as a co-trustee of an inter vivos trust established by their parents. The governing trust agreement included a no contest clause which provided for forfeiture "if any beneficiary or remainderman under this trust agreement in any manner, directly or indirectly, contests or challenges this trust or any of its provisions." The sister brought an action for a declaratory judgment to establish that her suit to remove her brother as a co trustee would not violate the in terrorem clause in the trust agreement. The trial court held that the sister's action would not violate the no contest clause and the appellate court affirmed. In so doing, the appellate court strictly construed the no-contest provision and held that it did not apply to the sister's anticipated suit to remove her brother as co-trustee because, first, the clause did not prohibit an action by a co-trustee and, second, the clause did not apply to actions for the removal of a trustee.

D. Drafting Considerations.

In light of the above considerations, in order for a no-contest clause to be effective in preserving the estate plan of a client, the following considerations should be taken into account in carefully drafting the in terrorem provision:

1. **Bequest to Potential Contestant** - The attorney should explain to the client that in order for a no-contest clause to be effective, a bequest must be made to the potential contestant in an amount that is large enough to discourage a Will contest, but small enough so that it does not disrupt the client's overall estate plan. For most clients this is a difficult decision, but it is a judgment call the client must make. However, if a contest is likely, then the potential contestant should be provided some type of incentive not to challenge the client's estate plan.
2. **Prohibited Actions** - As pointed out by John Hopwood in his excellent article cited in the bibliography, "one of the tactics frequently used to avoid the application of an in terrorem provision is to frame the litigation as being something other than a direct contest." These actions by a potential beneficiary/contestant might be in the form of a declaratory judgment action asking whether a contemplated lawsuit would cause forfeiture or, for example, a lawsuit against a favored beneficiary for tortious interference with inheritance rights. Accordingly, as John Hopwood suggests, the attorney should consider drafting the no-contest clause in a manner that it would be triggered if any such

disguised action is brought by a beneficiary. The attorney should also consider whether or not to attempt to cause forfeiture for actions brought by a beneficiary in good faith and with probable cause. However, it is not clear whether provisions drafted in this manner will be enforceable.

3. **Avoid Unduly Broad Provisions** - In drafting no-contest clauses, the attorney should be careful that the provisions are not so broad as to preclude beneficiaries from seeking relief for legitimate grievances, such as serious breaches of fiduciary duty by the executor, etc.... Unduly broad provisions of a no-contest clause might be held to be punitive and against public policy and therefore not enforceable.
4. **Additional or Alternative Provision** - As discussed in part III.L. of this article, consideration should be given to including a provision in the Will or trust agreement allocating all litigation expenses against any contestant's share or bequest and, in addition, providing that the contestant cannot be reimbursed for such expenses from the estate or trust. Such a provision could serve as an additional deterrent to a challenge of the instrument or as an alternative to a no-contest clause.
5. **Combine No-Contest and Arbitration Provisions** - In his article, John Hopwood discusses a suggested combination of a no-contest clause with arbitration or ADR provisions. "The general idea would be to require that any controversy within the scope of the in terrorem provision would be required to be submitted to the arbitration or ADR process before being filed in any court. Failure to file the arbitration/ADR procedure would be deemed a violation of the in terrorem provision regardless of the outcome of the litigation." John Hopwood points out a number of potential advantages of such a combined provision e. g.- could be as broad as the client desires, could include confidentiality requirements and limits on recovery, etc.); however, he also points out that it is unknown whether such a provision would be enforceable by a court.

V. CONCLUSION

In the litigious society we live in today with frequent second marriages, we, as estate planners, will be faced with more and more client situations where Will contests are likely. Accordingly, it is important for all of us to recognize those situations at the outset and to be able to implement effective measures to prevent and/or defeat actions taken by displeased beneficiaries or contestants to disrupt our clients' estate plans.

VI. PARTIAL BIBLIOGRAPHY

Beyer, Dickinson and Wake, "The Fine Art of Intimidating Disgruntled Beneficiaries with In Terrorem Clauses," 51 SMU L. Rev. 225 (1998).

Cenatiempo, "Preventing and Frustrating Will Contests and Related Disputes," State Bar of Texas 1997 Advanced Drafting: Estate Planning and Probate Course, Tab K.

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Hopwood, "In Terrorem and No-Contest Clauses," State Bar of Texas 1999, Advanced Estate Planning and Probate Course, Tab L.

Horrigan and Stanfield, "Preparing to Try a Will Contest," State Bar of Texas 1994, Advanced Estate Planning and Probate Course, Tab M.

Johanson's Texas Probate Code Annotated, West Group Publishing Company, 2002 Edition.

EXHIBIT "A"

PERSONAL PROPERTY DIVISION AND DISTRIBUTION SCHEDULE

1. **Special Bequests.** Certain items of personal property have been enumerated by _____ (hereinafter referred to as the "Decedent") in her letter to her children, dated August 9, 1979 (the "Special Bequests Letter"). A copy of the Special Bequests Letter is attached to this Schedule as Exhibit "A" and incorporated herein for all purposes. The items of personal property, which are specifically set forth in the Special Bequests Letter, shall be immediately distributed directly to the intended recipients in accordance with the terms of the Special Bequests Letter, and the monetary value of the foregoing items of personal property, if any, shall not be charged to such recipient(s). The items of personal property which are set forth in the Special Bequests Letter are identified as follows on the Appraisal Report of _____ or are otherwise described below:

- (A) Special Bequest Item #1 for _____ is located either (i) among the items of personal property which have not been inventoried or (ii) among items of personal property which have been grouped together with other items of personal property in a lot or is missing.
- (B) Special Bequest Item #2 for _____ is located either (i) among the items of personal property which have not been inventoried or (ii) among items of personal property which have been grouped together with other items of personal property in a lot or is missing.
- (C) Special Bequest Item #3 for _____ is located either (i) among the items of personal property which have not been inventoried or (ii) among items of personal property which have been grouped together with other items of personal property in a lot or is missing.
- (D) Special Bequest Item #4 for _____ is located among the items of personal property which have not been inventoried.
- (E) Special Bequest Item #5 for _____ is listed as Appraisal No. 31 (C).
- (F) Special Bequest Items listed as #6 for _____ were not individually inventoried and remain at the Decedent's house in _____, Houston, Texas.

- (G) Special Bequest Item #7 for _____ is located either (i) among the items of personal property which have not been inventoried or (ii) among the items of personal property which have been grouped together with other items of personal property in a lot or is missing.
- (H) Special Bequest Item #1 for _____ is in _____'s possession.
- (I) Special Bequest Item #2 for _____ is located either (i) among the items of personal property which have not been inventoried or (ii) among the items of personal property which have been grouped together with other items of personal property in a lot or is missing.
- (J) Special Bequest Item #3 for _____ is in _____'s possession.
- (K) Special Bequest Item #4 for _____ is listed as Appraisal No. 120.
- (L) Special Bequest Item #5 for _____ is listed as Appraisal No. 33.
- (M) Special Bequest Item #6 for _____ is listed as Appraisal No. 26.
- (N) Special Bequest Item #1 for _____ is located either (i) among the items of personal property which have not been inventoried or (ii) among the items of personal property which have been grouped together with other items of personal property in a lot or is missing.
- (O) Special Bequest Item #2 for _____ is in _____'s possession.
- (P) Special Bequest Item #3 for _____ is listed as Appraisal No. 142.
- (Q) Special Bequest Item #4 for _____ is listed as Appraisal No. 32.
- (R) Special Bequest Item #5 for _____ is in _____'s possession.
- (S) Special Bequest Item #6 for _____ is listed as Appraisal No. 65.

2. **Photographs and Documents.** Estate photographs, slides ("Photos") and all original Documents shall be turned over to the Administrator on or before Wednesday, March 1, 2000, at the Administrator's office, which is located at 333 Clay Street, Suite 3300, Houston, Texas 77002-4499. Photos and Documents shall not be inventoried or appraised and any Photos

(including frames) which are listed in the Appraisal Report shall not be considered as part of the Appraisal Report for distribution purposes, but shall be divided among the Heirs as follows:

- (A) Photos depicting a single Heir and/or the children and/or spouse of such Heir shall be given by the Administrator to such Heir (where no other Heir and no other Heir's children or spouse is depicted).
- (B) All Photos not covered by paragraph A above and all original Documents shall be made available to the Heirs for viewing at the offices of the Administrator and each Heir shall be given a reasonable period of time (expiring Wednesday, March 22, 2000) to make selections. All such Photos and Documents shall be allocated and distributed among the Heirs by the Administrator as follows:
 - (1) Photos and Documents desired by only one Heir shall be given to that Heir.
 - (2) Photos and Documents desired by more than one Heir shall be distributed among the requesting Heirs so that each Heir receives an equal number of such original Photos and Documents (to the extent practicable); and as to such Photos and Documents, the Estate shall, at its expense, make and furnish quality reproduction copies of such Photos and Documents to each requesting Heir who did not receive the original and desires a copy.

3. Visitation & Selection

- (A) Each Heir will be granted a reasonable period of time to inspect the items of personal property which belong to the Decedent's Estate, which are currently located at the Decedent's house in Houston, Texas; however, each Heir's inspection must be completed on or before Wednesday, March 15, 2000. Each Heir must contact the Administrator to schedule their respective inspection on or before Monday, March 13, 2000. Each Heir's inspection will be supervised by the Administrator or his agent.
- (B) Each Heir will prepare a list of items of personal property that he/she desires to inherit ("Initial List") from the Decedent's Estate. This Initial List will include a complete description of the items of personal property, the item numbers (as used by the Appraisal Report), and any other tag numbers that may be required to uniquely identify items of personal property (see below). The Heirs may

photograph the items of personal property (at his/her expense) and include a copy of the photographs with his/her Initial List if he/she so chooses.

- (1) If an Heir wishes to include an item of personal property in his/her Initial List which is not inventoried in either of the Appraisal Reports which was prepared by _____, then the Heir must attach a tag which bears a unique number to that item of personal property which was not included in the foregoing Appraisal Report.
- (2) If an Heir wishes to include a single item of personal property in his/her Initial List which is part of an appraised lot, then the Heir will attach a tag to the single item of personal property he/she wishes to receive that includes both the original appraisal number and a unique item number.
- (3) If the desired item of personal property has been previously tagged by another Heir, the item should not be retagged. Instead, the Heir should use the tag number(s) appearing on the previously affixed tag.
- (4) The Administrator will furnish each Heir with forms for the Initial List and uniquely numbered tags prior to his/her visit to the Decedent's house.
- (5) The items of personal property appearing on the Initial List which is submitted by each Heir may appear in any order.
- (6) The items of personal property which are specifically set forth in the Special Bequests Letter shall not be included in each Heirs' Initial List since these items of personal property will be distributed pursuant to the terms of that letter (which is attached hereto as Exhibit "A")(See section 1 above). If an Heir locates an item of personal property which is missing from the Appraisal Report which were prepared by _____, he/she should promptly tag such item, notify the Administrator, and provide a photograph of such item to the Administrator, if possible.

- (C) Each Heir shall submit his/her Initial Lists of desired items of personal property to the Administrator on or before Wednesday, March 22, 2000 at 5:00 p.m. Once the Administrator has received all Initial Lists of desired items of personal property, he shall prepare a Master List of all items of personal property desired by the three (3) Heirs and assign a value to each item of personal property requested by the Heirs. The Master List shall not specify which Heir selected the items of personal property appearing on the Master List.
- (1) The items of personal property on the Master List will be valued based on the following procedures:
 - (a) If the value of a specific item of personal property is set forth in the Appraisal Report which has been prepared by _____, then that value shall be used.
 - (b) If an item of personal property is part of a lot which was appraised by _____, then the value shall be determined by taking the total value of the lot, as set forth in the foregoing Appraisal Report, and dividing by the number of items in the lot.
 - (c) If an item of personal property is not included in either of the Appraisal Report which was prepared by _____, then the Administrator shall in his sole discretion assign values to that item of personal property which is not listed in the Appraisal Report.
 - (2) The Administrator shall distribute the entire Master List to each Heir no later than three (3) business days following the date the Administrator receives an Initial List from each Heir.
 - (3) Items of personal property which are not enumerated in the Special Bequest Letter and items of personal property which are not included in the Master List shall be immediately disposed of by the Administrator pursuant to the provisions set forth in Paragraph 5 below.

- (D) Each Heir shall prepare a Final List of items of personal property that he/she wishes to inherit by selecting items from the Master List. The Final Lists must be submitted to the Administrator within ten (10) business days of the date each Heir receives the Master List from the Administrator.
- (1) Only items appearing on the Master List can be selected for the Final List; however, an item can be placed on an Heir's Final List even if it was not included in that Heir's Initial List.
 - (2) The items on each Heir's Final List must be ranked in order of preference (1st choice to last choice).
 - (3) Each Heir will choose two (2) numbers within the range of 0 - 99 and write these numbers on the spaces provided on the Final List form. One number will be designated first choice and the other as second choice. These numbers will be used to assign the order of selection.
 - (4) The form for preparing the Final List and selecting the two (2) numbers will be provided by the Administrator.
 - (5) Once the Administrator has received a Final List from each Heir, he will send copies of all three (3) Final Lists and "order of selection" numbers to each Heir.
- (E) The Administrator shall select a Distribution Date and shall notify all heirs of this date at least three (3) business days prior to such Distribution Date.
- (1) The method of distribution for items of personal property which belong to the Decedent's Estate shall be as follows:
 - (a) Any item of personal property which is selected by only one Heir shall be distributed to that Heir.
 - (b) All items of personal property which are selected by more than one Heir shall be distributed by a round robin process.
 - (c) In turn, each Heir will be awarded the item of personal property that appears highest on his/her Final List that has not already been distributed.

- (d) This process will continue until all items of personal property appearing on the combined Final Lists have been distributed.
- (2) No heir will be awarded an item of personal property that did not appear on his/her Final List.
- (3) The "order for selection" will be as follows:
 - (a) The Heir choosing a number (first choice) closest to the final two (2) digits (to the left of the decimal point) of the Dow Jones Industrial Average ("DJA") for the business day preceding the Distribution Date shall select first, the Heir making the second closest choice shall select second; and the Heir selecting the number furthest away from the DJA number will select third.

For example, if X chooses 45, Y chooses 21, and Z chooses 88 and the DJA closes at 11,185.23, then Z chooses first because 88 is the closest number to 85. Conversely, X chooses second and Y chooses last.
 - (b) If numbers selected by two (2) Heirs tie, then their second choice of numbers will be used to break the tie. For example, if X and Y are tied for 2nd and 3rd choice, then the second number closest to the final two (2) digits of the DJA will be used. In this example, Z will still make the first selection regardless of his/her choice of a second number.
- (4) Within five (5) business days following the date the selection process has been completed, the Administrator will inform each Heir of the items of personal property and corresponding values that he/she has inherited and the items of personal property and corresponding values that the other heirs have inherited.

4. Removal of Personal Property. All items of Personal Property allocated to an Heir shall be removed from their locations by such Heir within twenty-one (21) days following the date each Heir is informed by the Administrator of the items of personal property that he/she

has inherited from the Decedent's Estate. All expenses associated with the removal of personal property from the Decedent's house in Houston, Texas shall be paid solely by the party incurring the same. Under no circumstances shall the Estate be responsible for any Heirs' moving costs. The Heirs shall coordinate pick-up with the Administrator and the Heirs can only schedule one (1) day to pick up their personal property.

5. Unselected Items. All Items which are not selected during the process detailed above shall be disposed of in one of the following manners:

- (A) The Administrator shall decide in his sole discretion which items will provide additional funds to the Estate by being consigned for sale. The Administrator shall decide in his sole discretion the location for such consignment sale.
- (B) All remaining items not sold by consignment shall be donated in the name of the Decedent's Estate to the Salvation Army or any other charitable organization which both wants and has the facilities to process the amount of items to be donated. Donations can be split between charitable organizations at the Administrator's sole discretion.

6. Final Report of the Administrator. After the above distribution and allocation process has been completed, the Administrator shall issue a Final Report to each Heir. The Final Report shall contain the following information:

- (A) A complete description of all items of personal property distributed to each Heir (e.g.-by tag number and appraisal amount) by the Decedent's Estate; and
- (B) a list of the items of personal property consigned to and sold by or donated to the Salvation Army or any other charitable organization, including the total value of such sale or donation.

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³ For a real life example of just how contentious and ludicrous the division and distribution of nominally valued personal property can become in a situation where an unmarried decedent left her entire estate to her only three (3) children, please see the personal property distribution schedule which is attached to this article as Exhibit "A". To fully appreciate the attached Exhibit, please be advised that all three (3) of the decedent's children were represented by counsel.