Memorandum 87-44

Subject: Study L-636 - No Contest Clause

At the last meeting, the Commission briefly considered a letter from our consultant, Professor Russell D. Niles, concerning no-contest provisions in wills. The Commission deferred consideration of the letter until the June meeting so that the Commissioners would have an opportunity to study the letter before discussing it. A copy of the letter is attached as Exhibit 1. This issue presented for Commission consideration by the letter is an important one that should be determined only after careful consideration of the relevant policy considerations. You should read the letter and all the other attachments to this Memorandum with care prior to the meeting.

SHOULD CALIFORNIA ADOPT THE MAJORITY RULE CONCERNING NO-CONTEST CLAUSES?

The basic policy issue is whether California should adopt the majority rule concerning the effect of a no-contest clause in a will, trust, or other donative transfer instrument.

Under the California minority rule, if a will is contested and the contest is covered by the no-contest clause, the losing contestant forfeits his or her interest under the will.

Under the majority rule, the losing contestant forfeits his or her interest under the will unless the contestant establishes that evidence existed at the time the contest was initiated that would lead a reasonable person, properly informed and advised, to conclude that there was a substantial likelihood that the contest would be successful.

The California rule has been justified on the ground that it prevents litigation. See In re Hite's Estate, 155 Cal. 436, 101 P. 443 (1909). The Executive Committee of the State Bar Section objects to the adoption of the majority rule: The Executive Committee believes that adoption of the majority rule would unduly shift power to contestants in negotiating settlements of will contests. The Executive Committee believes that adoption of the majority rule would permit the contestant to hold an estate hostage by prolonged expensive litigation,

in the hope of winning a settlement, and that a compassionate court would relieve the contestant from forfeiture of the contestant's interest under the will should the will contest fail.

In practice, the strict minority rule may deprive the contestant of an opportunity to obtain court review of a matter that should be reviewed by the court. See, for example, Exhibit 2 (attached) -- a recently published newspaper account of an Oakland case where the beneficiary of the will would risk approximately $600,000 if she were to challenge a devise of $250,000 each to the lawyer who drew the will and the lawyer's secretary. It can be argued that the strict minority rule is a license to steal in a case like this. Where undue influence was exercised in connection with a will, it is likely that a very broad no-contest clause will be included in the will. Note that the beneficiary in the Oakland case has decided she can not afford to risk what she is given under the will in order to have a court review the case.

A no-contest clause does not discourage all will contests. Such a clause has limited application. First of all, it does not discourage a contest by one who receives nothing or only a nominal amount under the will. Such a contestant has nothing to lose by challenging the will. Second, because of the harshness of the minority rule, the courts have strictly limited the application of the rule. As the court points out in Lindstrom v. Hopkins, decided on April 24, 1987, but not yet reported in the printed advance sheets:

> An in terrorem clause creates a condition upon bequests provided in a will which is enforced in California. Whether there has been a contest within the meaning of a particular no-contest clause depends upon the particular case and the language used. Determination of whether a prohibited contest has occurred must be made on a case-by-case basis.
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> * * *
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> A rule of strict construction of an in terrorem clause is established in this state and should be followed. An in terrorem clause in a will "is to be strictly construed. . . ." An in terrorem clause is to be given "no wider scope . . . than is plainly required. . . ."[Citations omitted]

As noted above, the Executive Committee fears that adoption of the majority rule would give persons who contest the will too much leverage

in settlement discussions. It is true that the California minority rule gives an almost overwhelming bargaining power to the other persons who take under the will. The contestant is in a poor bargaining position because the contestant forfeits his or her interest under the will if he or she loses the contest. But this effect is limited. A no-contest clause has no effect on settlement negotiations with a contestant who does not have a substantial interest under the will. Moreover, the rule of strict construction of the clause significantly limits the effect of the clause in estate litigation; the no-contest clause does not effectively limit the power to contest the will where the language of the clause is not broad enough to cover the specific action taken by the contestant.

If the majority rule were adopted in California, the contestant would still be in a poor bargaining position in settlement discussions. The contestant must incur the expense of the attorney fee and other expenses to contest the will, and the contestant will not receive his share of the estate until the litigation is concluded. More important, the contestant runs the risk that his interest under the will be forfeited if he loses the contest. There can be no assurance that the court will relieve the contestant of the forfeiture; the contestant may be unable to satisfy the court that evidence existed at the time the contest was initiated that would lead a reasonable person, properly informed and advised, to conclude that there was a substantial likelihood that the contest would be successful. Strong evidence is required to justify a will contest because few will contests are ultimately successful. Given the minimal capacity required to execute a valid will, it is extremely difficult to have a will declared invalid for lack of capacity. To prove that the will is the result of undue influence is also difficult.

You will recall that the Commission previously has considered and rejected different approach to this problem. That approach would have made it easier to have a will held invalid for lack of capacity. The proponent, having failed to persuade the Commission, went to the Legislature in 1985 and found some support there. However, the legislation enacted as a result of the proponent's concern (Probate Code Section 6100.5) probably did not make it significantly easier to set aside a will.

The staff recommends that the Restatement (majority) Rule be added to the portion of the Probate Code dealing with "Construction of Wills, Trusts, and Other Instruments." Exhibit 3 (attached) sets out material that would be useful and persuasive in applying the Rule if it were adopted in California.

DECLARATORY RELIEF

The Executive Committee of the State Bar Section recommends that legislation be enacted to permit a beneficiary to obtain an advance declaration whether a prospective action will violate a particular no-contest clause. This declaratory relief is considered important because of the drastic consequences flowing from the violation of an in terrorem clause. The Executive Committee states:

> Declaratory relief is particularly important to surviving spouses who wish a determination as to the ownership and character of the decedent's property (e.g., separate, community or joint tenancy property and the extent thereof), or a set aside of exempt property, or a family allowance, or reimbursement via a creditor's claim, or an accounting, or a myriad of other things which, after the fact, may be determined to be an indirect contest.

As previously noted in this Memorandum, determination of whether there has been a contest within the meaning of a particular no-contest clause depends upon the particular case and the language used. Often it is not possible to know until a court rules on the issue whether the no-contest clause is applicable. For example, in the very recent case of Lindstrom v. Hopkins, decided on April 24, 1987, the Court of Appeal reversed a trial court decision that forfeited interests pursuant to a no-contest clause in the will. In some cases, whether the clause applies depends on the manner in which the lawyer for the contestant is able to raise the issue.

Whether or not the Commission decides to adopt the majority rule concerning the effect of a no-contest clause, the staff recommends that provisions be drafted to permit declaratory relief along the lines suggested by the Executive Committee.

Respectfully submitted,

John H. DeMoully
Executive Secretary

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March 13, 1987

Judge Arthur K. Marshall
Chairman
California Law Revision Commission
300 South Grand
Los Angeles, CA 90071

Dear Judge Marshall:

I should like to ask you a few questions about no-contest provisions in wills that you are especially qualified to answer because of your experience as a probate judge.

Now that the probable-cause rule has been adopted by the Uniform Probate Code [Section 3-905] and has been approved by the American Law Institute [Restatement, Second, Property, Donative Transfers, §§9.1 and 9.2] it has become the majority view. California has retained the strict view of the 1944 Restatement of Property [§§428 and 429] and enforces a forfeiture, if intended by the donor, whether probable cause exists or not. The difference in the two views is the perception that it is in the public interest to have the validity of some donative transfers challenged. When a contestant establishes that the decedent probably lacked testamentary capacity, or probably was subject to duress, fraud or undue influence, does the court need to

have the beneficiaries come forward to help the court preserve the integrity of the judicial process? Such an argument is well made in several leading cases:

In South Norwalk Co. v. St. John [92 Conn. 168, 101 Ate. 961 (1917)] the court said:

> "Courts cannot know whether a will, good on its face, was made in conformity to statutory requirements, whether the testator was of sound mind, and whether the will was the product of undue influence, unless these 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. Courts exist to ascertain the truth and to apply it to a given situation, and a right of devolution which enables a testator to shut the door of truth and prevent the observance of the law is a mistaken public policy. * * *"

> "Where the contest has not been made in good faith, and upon probable cause and reasonable justification, the forfeiture should be given full operative effect. Where the contrary appears, the legatee ought not to forfeit his legacy. He has been engaged in helping the court to ascertain whether the instrument purporting to be the will of the testator is such. The contest will not defeat the valid will, but it may, as it ought, the invalid will. The effect of broadly interpreting a forfeiture clause as barring all contests on penalty of forfeiture, whether made on probable cause or not, will furnish those who would profit by a will procured by undue influence, or made by one lacking testamentary capacity, with a helpful cover for their wrongful designs."

> "The practical difficulties following this exception are more apparent than real. Contests will be made only in causes where they are justified. Doubtful cases will not invite a forfeiture. There will be no more burden put upon the court in finding the fact of probable cause than in finding similar facts in other cases. * * *"

In re Cocklin's Estate [236 Iowa 98, 17 N.W. 2d 129 (1945)] the Supreme Court of Iowa, overruling a 1909 decision in accord with the early California cases, held as follows:

> "Under the law no will can become effective in any of its provisions until it shall have been admitted to probate by the court. Before admitting it to probate, it is the duty of the court to investigate the facts and circumstances attending its execution and bearing upon its validity, and to find judicially therefrom that such will was executed in due form, voluntarily, and understandingly by the purported testator. If the court should find otherwise, it must reject the will and refuse its probate. * * *"
>
> "Manifestly, in order to attain true judicial results, the court has need to learn true facts. These must come, if at all, from those who are or were in a position to know them. * * * If the court is to learn the truth from outside sources of information, it is manifestly important that the highway of information to the court be kept open, and that there shall be no lion in the way. But here is a forfeiture provision in the purported will itself which may be a roaring lion intended to terrorize every beneficiary of the will. Its demand is that no adverse evidence be volunteered. Its tendency is necessarily to suppress material facts, and thus to impede the administration of the law according to its true spirit. * * * And it does sometimes happen in very truth that a will regular in form, bearing the genuine signature of the testator in the presence of witnesses, is nevertheless not his will. On the contrary, it was framed and dictated by another, and the dying man mayhap put to it his listless hand without knowledge to comprehend or will to resist. Into such a will the proviso under consideration will hereafter surely find a place. The dictator of such a will will be more likely to incorporate such a provision in the will than would the testator himself. On principle, therefore, and in the interest of good public policy, it seems clear to me that the contest of a will in good faith and for probable cause should not be forbidden nor penalized, nor should it be permitted to work a forfeiture of a legacy. * * * "

From the point of view of the probate court, do you think the rationale of the two decisions is sound? Put another way, do you think that a probate judge after a

contested probate might properly say: "I decide that the will should be probated, but the case was close enough so that it should have been tried by a court?"

The State Bar study team, which has been so helpful to the Commission, takes the view that a contestant should be entitled to obtain an advance declaration as to whether or not a prospective action would violate a no-contest clause, but if the court declares that the conduct would violate the clause, then the beneficiary should proceed at his or her peril. In the letter of Mr. H. Neal Wells, III, to Mr. James D. Devine, dated June 24, 1986, the opinion is expressed "that it is appropriately permissible for a testator to require beneficiaries to accord the testator's estate a peaceful administration with forfeiture penalties for breach of that peace."

The study team recognizes two exceptions: "Good faith contests based on forgery or revocation." The first Restatement was more explicit. It provided that no-contest provisions were invalid if a will was contested "with probable cause" on the ground of forgery or revocation by a subsequent instrument. The rationale was that if a beneficiary had the knowledge of the probable commission of the crime of forgery or knew of the existence of an instrument which was probably a subsequent will or codicil, such a beneficiary had a moral and perhaps a legal duty to

come forward. Even if the testator intended a forfeiture, the clause was invalid if there was probable cause.

If this is so, why draw the line with these two grounds of contest? For example, what is the real difference between forgery and extrinsic fraud? If "menace" means physical violence or the threat of violence why is it different?

Mr. Wells' letter indicates that the bar is primarily concerned about contests on the ground of incapacity or undue influence. So are all of us. These are the cases in which there is the greatest likelihood of an unmeritorious contest. But even here there are cases too close to be decided without the aid of the judicial process. For example, in the Cocklin case the will was contested on the grounds of undue influence and lack of testamentary capacity. The case was close enough to require the jury twenty-nine hours to reach a verdict.

An important case in point is Hartz' Estate v. Cade [247 Minn. 362, 777 N.W. 2d 169 (1956)]. Cousins of the testator contested the testator's will on the grounds of incapacity and undue influence when the testator devised the major portion of his estate to his housekeeper. The probate court admitted the will to probate and held that the contestants had forfeited their bequests under a no-contest clause. The contestants appealed from the order of distribution on the

ground that they had proceeded with probable cause. There was an extensive record including several hearings and two prior appeals. The Supreme Court of Minnesota affirmed a decision of the intermediate court reversing the probate court on the forfeiture issue. The court concluded:

> "We have carefully examined all such files, proceedings, and briefs, and based thereon, we cannot escape the conclusion that contained therein is ample evidence to support the finding that the contest here was "begun and prosecuted in good faith and with probable cause" and "that it was not frivolous, vexations nor actuated by malice." Since this is true, under our above determination, it follows that the forfeiture clause relied upon by appellants may not be applied in nullifying the bequests made to respondents.
>
> "It is contended by appellants that the admission of the will to probate established the validity of the forfeiture clause therein so that the issue as to respondents' right to receive the specific bequests become res judicata. As indicated above, the validity of the forfeiture clause is recognized but its applicability here denied because of the finding that in the will contest respondents were motivated by good faith and had probable cause to believe the will invalid. * * *"

The present California law is, of course, contrary to the three cases discussed above. See Estate of Friedman [161 Cal. Rptr. 311 (1979)]. Indeed, the facts in the Friedman case suggest that it may now be the time to re-examine the strict rule. The court held that the daughter would forfeit a legacy of $50,000 and other benefits if she contested her mother's will, even though the facts alleged, if established, constituted an egregious case of undue influence. In such a case should not a contestant at some time and by some procedure be entitled to

have a judicial determination that he or she acted in good faith and with probable cause?

If the arguments in the cases cited above have any validity, the Commission might consider several alternatives.

1. Recommend the adoption of the Uniform Probate Code section 3-905:

> "Penalty Clause for Contest. A provision in a will purporting to penalize any interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings."

The study team thinks this statute changes the balance too much. The section does leave several questions unresolved: When is the court to decide the issue of probable cause? Who has the burden of proof? What is the function of the judge and the jury?

2. Make no recommendation. Since the California law on no-contest clauses is entirely judge-made, the Supreme Court is free to overrule or to modify the old cases (as Iowa has done). The Second Restatement is likely to stimulate reconsideration.

3. Ask the staff to attempt a new draft of a statute which would permit a beneficiary, within specified limits (after probate or earlier by way of declaratory relief) to raise the issue of probable cause. The petition would be at

the expense and risk of the contestant. The court would decide the issue without a jury. The study team has pointed out ambiguities in the earlier draft which could be avoided.

I would appreciate it very much if you would take the time to give me and the staff your reaction to this letter.

Sincerely,

Russell D. Niles

Lawyer gets bequest, state bar begins probe

OAKLAND (AP) — Acting on a relative's complaint, the State Bar is conducting an inquiry into the conduct of a prominent attorney who was left $250,000 by an elderly woman whose will the lawyer helped prepare, the lawyer said Tuesday.

The probe seeks to determine whether Oakland attorney Ned Robinson, two-time mayor of Lafayette, engaged in any undue influence in 1980 preparation of the will of the late Marjorie Mock of Orinda, who left an estate of $1.3 million when she died Dec. 3 at age 92.

Another $250,000 went to Bobette Burgett, Robinson's former secretary in his Oakland law firm. Half the estate went to Mock's niece, Renita Mock of San Francisco, who filed a complaint with the State Bar.

"I was shocked by what appears to be unethical conduct by my aunt's attorney," said Renita Mock. She said her aunt, a retired teacher, never told her of any plans to name Robinson and Burgett in the will.

Mock said she filed the bar com-'aint because the will would strip her of her inheritance if she contested the will in court. Robinson said that clause was the deceased woman's idea.

Robinson, twice nominated for a federal judgeship, said in an interview he did nothing improper in preparing the will drawn in 1980, and that Mock was "absolutely competent" to sign the will.

But her physician, Dr. Eugene Whitney, who treated Mock from 1979 until her death, said, "She had been confused the whole time I knew her . . . she was incompetent . . . I doubt whether I would have said she was competent in 1980."

Court records say Mock signed the will on May 3, 1980, two years after she was placed under public conservatorship and admitted to Lafayette Convalsescent Hospital, diagnosed as having "chronic brain syndrome, delusional reactions and arteriosclerotic heart disease."

Robinson said he drafted the will, which included his bequest, because he felt obliged to fulfill the wishes of his client.

Memo 87-44 Exhibit 3 Study L-636

RESTATEMENT OF THE LAW SECOND

PROPERTY 2d

Donative Transfers

Volume 1

§§ 1.1–10.2

TABLES and INDEX

As Adopted and Promulgated

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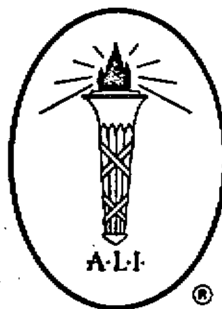

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Chapter Nine

RESTRAINTS ON CONTESTS AND RESTRAINTS ON ATTACKING FIDUCIARIES

Introductory Note

Section

9.1 Restraints on Contests

9.2 Restraints on Attacks on Fiduciaries

Introductory Note: The transferor of a donative transfer is frequently concerned lest beneficiaries, who may stand to gain more as heirs-at-law than as beneficiaries, attempt to prevent the transferor's wishes from being carried out. This is particularly true when the dispositive instrument is a will, because the transferor can take no corrective action after the will becomes effective; it can also be the case when the dispositive instrument is a revocable inter vivos trust as the transferor may be deceased when a contest is initiated. Hence, transferors frequently try to forestall such contests by requiring beneficiaries to refrain from contesting the dispositive instrument or attacking any of its provisions on penalty of forfeiting the property interest which would otherwise pass to them under the terms of the instrument. Restraints of this nature are considered in § 9.1.

Anticipating unjustified litigation directed against the fiduciaries the transferor has selected to carry out the dispositive plan, the transferor may impose a restraint specifically directed at such attacks. The validity and effect of these restraints are considered in § 9.2.

§ 9.1 Restraints on Contests

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

Illustrations:

1. O, owning Blackacre in fee simple absolute, makes an otherwise effective devise thereof in fee simple to his son S.

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

2. O establishes a revocable inter vivos trust. Under the terms of the trust, O retains the right to the trust income for O's life and on O's death, if the trust is not revoked by O, the trust property, as augmented from any other source as a result of O's death, shall pass "one-fourth to O's son S and the balance to O's daughter D." O transfers most of his property to the trust at the time the trust is established and O's will pours into the trust all of O's property not placed in the trust in O's lifetime. The trust contains the following clause: "If any beneficiary under the trust should directly or indirectly contest, oppose or dispute this trust as it is to operate from and after my death, I direct that such beneficiary shall receive nothing hereunder and the trust property that would otherwise pass to such beneficiary shall pass to the other beneficiary hereunder." After O's death, S contests the trust on the ground of undue influence on O by D. S is unsuccessful in this contest. The only basis for S's claim of undue influence was the inequality of treatment as revealed by what he received as compared with what D received. The conclusion is justified that there was no probable cause for the contest. S receives nothing under the trust. The one-fourth that otherwise would have gone to S passes to D.

3. O, by will, transfers the sum of $100,000 in trust "to my son S for life, with power to appoint the same by will to one or more of his children, and in default of such appointment, equally to said children." S, by an otherwise effective will, devises his business "to my son, Charles, on condition that he shall not dispute any provision of this will." S's will appoints $100 of the trust fund to Charles and the balance to S's remaining children. Charles attacks the appointment as ineffective on the ground that S's power only permitted ap-

pointment among S's children equally. Though this suit by Charles requires a construction of the scope of the power given by O to S, the effect, if the position advocated by Charles prevails, is to invalidate the provision in S's will that exercises the power. Charles is unsuccessful in his suit. A finding is justified that the attack was made without probable cause. The devise to Charles of the business is forfeited but he is still entitled to the $100.

Comment:

a. Rationale. A will or other donative transfer is normally contested on some one or more of six grounds, namely, lack of capacity, fraud, undue influence, improper execution, forgery, or subsequent revocation by a later document. In order to avoid the danger to attempted dispositions presented by a possible contest, the transferor may endeavor to restrain specified persons from undertaking such a challenge. A restraint against contest may serve purposes other than preserving the particular dispositions of the transferor against attempted overthrow by a disappointed person seeking to gain an unintended enrichment at the expense of others. It tends to lessen the wasting of the estate in litigation and the chance of increasing family animosities by besmirching the reputation of the transferor when the transferor is no longer alive to provide a defense. It may discourage the contesting of donative transfers as a means of coercing others into the making of a settlement. Suits brought for this purpose are most easily premised upon issues which involve uncertain states of fact, a situation normally existing when parties make claims of fraud, undue influence, and lack of capacity. By discouraging these types of suits, no-contest provisions may reduce the likelihood of such coercion.

For these reasons, most courts have upheld the validity of the restraint. The persons affected by the restraint always retain the right to litigate, and if in such litigation it is established that the proffered document should not be upheld, the no-contest provision and the donative transfer both fall. If a beneficiary litigates unsuccessfully and then seeks to claim under the donative transfer, it is not unfair that the beneficiary should suffer the penalty imposed by the transferor for such conduct where that beneficiary cannot establish that there was probable cause for a contest.

When, however, the contestant establishes that there was probable cause, there is a public interest in having the donative transfer challenged. It would be a contravention of public poli-

cy to place a deterrent upon such action. Hence, the rule of this section does not permit the risk of a forfeiture of a transfer to be imposed when there is probable cause to believe the donative transfer is not valid.

An otherwise valid will, after having been admitted to probate, or otherwise valid donative transfer, may still be attacked piecemeal on various charges of illegality and unenforceability. The transferor's desire, not only to protect the donative transfer against defeat, but also to prevent the invalidation of specific provisions contained therein, may cause the transferor to insert a clause in the donative transfer designed to make the acquisition or retention of benefits under the donative transfer dependent upon the absence of such attacks.

Numerous situations exist where a person, acting in self-interest, is an unwitting agent of the public. For example, mortmain statutes in some states place limits on testamentary gifts to charities; it is in the public interest that these laws, if constitutional, be enforced (see Illustration 4). Similarly, it is a matter of interest to the community, and this is the basis of the rule against perpetuities, that property should not be removed from the stream of commerce for too long a period. If an interested person has probable cause to believe that a dispositive provision violates such a statute or rule, an attempted deterrent to raising this issue is invalid under the rule stated in this section. If no probable cause exists, however, the transferor's intention is given full effect.

b. Form of the restraint. Usually, the restraint takes the form of a condition subsequent or executory limitation operating on a gift already vested. It may also be in the form of a condition precedent or special limitation. The determining event is usually described by some phrase which, under the circumstances, discloses an intent to forbid any attack upon the will or other donative transfer which is designed to cause the rejection of that instrument as valid. Where a will is involved, such phrases as "contest the will," "prevent or oppose the probate," "dispute the will," or "take proceedings to attack the will" are frequently employed. The provisions may also be affirmative in nature, requiring the beneficiary under a will to "acquiesce in and consent to the will." In rare cases, a more specific form is employed, such as "make any claim that I am of unsound mind." There is thus, preliminary to the question of validity, an issue of construction as to whether the particular conduct alleged to be in violation of the restraint falls within the intention of the transferor as expressed in the restraint. Where the most com-

prehensive form of restraint is employed, the language may be construed to include, not only the six grounds of attack noted in *Comment a*, but also attacks upon particular provisions of an otherwise valid document.

Restraints on attacks on particular provisions of a will are most often annexed to restraints on any contest of will. "Contest the will or any provision" and "seek to invalidate the will or any part thereof" are common forms of such restraints. Less frequently, clauses restraining attacks on particular provisions appear alone: "dispute or oppose any provisions of this will" and "contest any provision of this will" are examples. General provisions against will contests may be construed to apply to attacks on particular provisions as well.

In some instances, the restraint in regard to a particular provision may refer to a specific form of attack, such as "attack any gift herein made to charity as excessive" (see Illustration 4) or, although general in scope, may by its terms apply only where the attack is unsuccessful. As is the case with no-contest provisions, there is a preliminary issue of construction as to whether the conduct alleged to be in violation of the restraint against attacks is within the bounds of the conduct which the transferor intended to proscribe in creating the restraint, and the restraint should be construed as narrowly as possible consistent with its terms.

Illustration:

4. O, by an otherwise valid will, bequeaths her residuary estate "one-half to my son S and one-half to the X Foundation." No real property is in the residuary estate. O's will also contains the following provision: "If any donee attacks any gift herein made to charity as excessive, I direct that such donee shall receive nothing under my will and the interest such donee would otherwise take shall pass to my heirs at law determined as though such donee had predeceased me without leaving issue who survived me." S challenges the gift to the X Foundation as violative of the mortmain statute of State A, in which the X Foundation is located. The mortmain statute of State A limits charitable bequests to one-third of the transferor's estate. The court determines that the laws of neighboring State B, in which O was domiciled at her death, determine the validity of the bequest to the X Foundation. Under the mortmain statute of State B, the gift to the X Foundation is valid. S did not have probable cause to believe that the mortmain statute of State A would govern

the validity of the gift to the X Foundation. Thus, S will forfeit his right to one-half of the residuary estate under O's will. The forfeited one-half passes to O's heirs at law determined as though S predeceased O without leaving issue who survived O.

In lieu of making the acquisition or retention of the entire gift contingent upon accepting the validity of the will or other donative transfer, or refraining from attacking particular provisions of it, the transferor may provide that, in the event of a contest or of an attack upon a particular provision, there shall be forfeited so much of the gift as is necessary to reimburse the estate for the costs and expenses incurred in defending against the contest or attack. The same rule applies to this limited form as to more general forms of restraint.

c. What amounts to a contest. A restraint upon contest, general in form, normally is intended to apply to any attack upon the will or other donative transfer which is designed to invalidate the document. An attack upon the jurisdiction of the particular court to which a will is presented for probate does not normally violate such a restraint, as this attack is not upon the validity of the will itself. It is possible, however, for such an attack to constitute a contest of the will. This would be the case if the jurisdictional attack, if successful, would force the will to be offered for probate in a state where it would be invalid because not in compliance with the formalities for a valid will in that jurisdiction. A suit to construe the language of a will is not a contest of the will and hence is not a violation of a no-contest provision, unless the construction advocated by the person bringing the construction suit would invalidate the dispositive instrument or a provision thereof (see Illustration 3). Participating in a compromise agreement is not a "contest" of a will unless the no-contest provision states otherwise. An action commenced solely for the purpose of obtaining information concerning a donative transfer does not violate a no-contest provision.

d. Attack upon particular provision. The term "attack," as used in this section, means an attempt to procure a judicial decision holding invalid some provision of the will or other donative transfer. A proceeding brought by a beneficiary for the purpose of securing a construction of an ambiguous limitation, valid under all possible constructions or valid under the construction advocated by the beneficiary, is not an "attack" as that term is used in this section. In that case, the beneficiary is seeking merely to ascertain and to protect a gift and is not endeavoring to circumvent the will of the transferor (see Illustra-

tion 5). Thus, if the transferor, by the terms of the limitation, has sought to impose a restraint against a construction proceeding, the validity of that restraint is not determined by the rules stated in this section. By analogy to the rule of this section, however, a restraint against a suit for the construction of a dispositive provision should not cause a forfeiture of any interest if there was probable cause for bringing the construction suit.

Illustration:

5. O, by an otherwise effective will, devises "my northeast lot to my son S and his heirs." Another provision in the will is as follows: "If any beneficiary herein named shall attempt to make null any provision of this will, such beneficiary's share shall be void and I give the same to my daughter D." O owns two lots capable of being described as the "northeast lot," and S brings a proceeding for a construction of the will. D thereafter brings an appropriate action against S, claiming that S has forfeited his devise by virtue of the construction suit. The construction proceeding brought by S does not constitute an attack upon a provision of the will.

e. Extent to which contest or attack is pressed. The commencement of an action to contest a will or other donative transfer or to attack a particular provision thereof, upon any of the grounds within the scope of the clause restraining such contests or attacks, should normally be construed to be a violation of the restraint. In the absence of specific language to the contrary, the restraint should be construed to be violated regardless whether the action to contest the dispositive document or to attack a particular provision thereof is subsequently withdrawn either immediately after its commencement, prior to a hearing, at the trial, or at any time thereafter. The mere filing of a paper which is intended solely to procure time to ascertain the facts upon which the decision to contest or to attack must rest should usually be construed not to constitute the commencement of an action to contest or to attack.

Illustrations:

6. O, by an otherwise effective will, gives the income of her residuary estate "to my daughter D, on condition that she shall not contest or oppose this will." D files a suit attacking the will, alleging that O lacked testamentary capacity. Two days later she withdraws her suit. A conclusion is justified that the condition to D's gift has not been fulfilled. She will not be entitled to the income unless she establishes

that there was probable cause to believe O lacked testamentary capacity.

7. O, owning Blackacre and Whiteacre in fee simple absolute, makes an otherwise effective devise of Blackacre in fee simple to his son S, and of Whiteacre in fee simple to O's neighbor X. The will provides that "if any person named herein shall take any proceedings against this will or any clause thereof, I direct that his or her gift shall become null and void, and the share of such person shall pass to the Y Foundation." S institutes an action attacking the devise to X as having been the result of undue influence. After three days of trial, S consents to a dismissal of his suit. A conclusion is justified that S's interest in Blackacre is forfeited to the Foundation unless he establishes that there was probable cause to believe the devise to X was the result of undue influence.

f. Nature of the contest or attack. A restraint otherwise valid under the rule stated in this section is violated, not only by a direct contest or attack instituted by the beneficiary and alleging any of the grounds within the scope of the restraint, but also by voluntary conduct of the beneficiary that amounts to an indirect contest or attack. For example, such a restraint is violated when the person restrained voluntarily instigates or aids another person in that person's attempt to contest the will or other donative transfer or to attack particular provisions of it. Such aid may consist of sharing the expenses of the proceeding. Such aid may involve the beneficiary entering into an agreement with the person instituting the proceeding whereby the beneficiary is assured, in return for assistance at the trial, that he or she will receive the property transferred to him or her in the dispositive instrument, even if it is overthrown (see Illustration 8) or the particular provision stricken from it.

Illustration:

8. O, owning Blackacre and Whiteacre in fee simple absolute, makes an otherwise effective devise of Blackacre in fee simple to his son S, and of Whiteacre in fee simple to O's brother B. The will provides that "if any devisee should attack my will on any ground, real or imagined, then his or her devise shall be forfeited and shall go to my residuary estate." D, another child of O, unsuccessfully contests the will on the ground of undue influence. In advance of the hearing, S and D enter into an agreement under which D agrees that if she is successful, and she and S inherit the entire estate, S shall

receive Blackacre. At the trial, S offers testimony in support of D's contentions. The interest of S in Blackacre is forfeited unless S establishes that there was probable cause to believe that there was undue influence.

g. Persons acting in a representative capacity. The beneficiary may be acting, not only on his or her own behalf, but as a representative of some other person interested in the estate of the transferor, in the capacity of guardian, committee, executor, administrator, or otherwise. Where a person in a representative capacity institutes a suit contesting the dispositive instrument or attacking a particular provision thereof, the failure of that contest or attack should have no effect on his or her own gift, unless the representative status is being used as a means of presenting personal views. This latter situation is analogous to the instigation of a contest or attack by another person.

A contest of a will or other donative transfer, or an attack upon a provision thereof, initiated and conducted by a guardian of an infant, or by a committee or a conservator of an incompetent on behalf of the ward, should not constitute a breach of a provision against contest or attack that will affect the interest of the infant or ward. Probable cause should be found to be present whenever the representative in good faith thought that the protection of the infant or the ward required the contestor the attack.

h. Conduct of a person other than the beneficiary. The validity of a restraint is unaffected when the interest in property is made expressly contingent upon the conduct of someone other than the beneficiary. For example, a transferor may provide for the forfeiture of a gift to a grandchild in the event that the disinherited parent of the grandchild institutes proceedings either to contest the dispositive instrument or to attack any of its provisions. A restraint against such contest or attack, however, will not be construed to have this breadth of application unless the language and circumstances of the dispositive document clearly reveal that the transferor intended that result. Similarly, unless the language and circumstances of the dispositive document clearly indicate a contrary intention, the restraint is not construed to operate against the beneficiary when a contest or attack is instigated by a person who will receive the transferred property in the event of a violation of the restraint, or is brought primarily for the purpose of causing the property to devolve upon the subsequent taker (see Illustration 9).

Illustration:

9. O, owning Blackacre in fee simple absolute, makes an otherwise effective devise thereof "to my granddaughter Mary and her heirs, but if her father, my son S, for whom I make no provision in view of the large gifts which I have given him in my lifetime, should contest this will, I give Blackacre to my other granddaughters equally." The other granddaughters are on bad terms with Mary. At their instigation, and in order to cause a forfeiture of Blackacre, S unsuccessfully contests the probate of the will on the ground of fraud. It is found as a fact that the primary purpose of the testator was to prevent undue enrichment of S, and that the testator did not foresee that S might instigate a contest for the purpose of causing the property to pass to the other granddaughters. Mary's interest in Blackacre is not forfeited, even though S did not have probable cause to contest the will.

i. Effect of the absence of a gift over. If the language and circumstances of a transfer are otherwise sufficient to create a condition subsequent or special limitation in restraint of contests or of attacks on particular provisions of the dispositive document, the absence of a gift over upon the occurrence of those events in no way prevents the finding of a restraint. The rule stated in this Comment rejects the "in terrorem" doctrine, which invalidated restraints annexed to transfers of personalty in the absence of a specific alternative gift upon breach. If, however, the language and circumstances of the transfer are ambiguous in regard to the presence or absence of a restraint, the absence of a gift over is a relevant factor indicating that the language did not create a restraint against contest or against attacking particular provisions of the dispositive document.

If the restraint provision does not contain a gift over on its violation, the forfeited interest may pass to persons that include the person whose interest has been forfeited, as where the forfeited interest would pass on intestacy and the person whose interest is forfeited is an heir of the transferor.

j. Existence of probable cause. As used in this Restatement, the term "probable cause" means the existence, at the time of the initiation of the proceeding, of evidence which would lead a reasonable person, properly informed and advised, to conclude that there is a substantial likelihood that the contest or attack will be successful. The evidence needed to establish probable cause should be less where there is strong public policy

supporting the legal ground of the contest or attack. Thus, less evidence should normally be necessary to support a probable cause determination where the ground of contest or attack is forgery of the testator's signature or his subsequent revocation of the will than would be necessary to support such a determination under a mortmain statute. A factor which bears on the existence of probable cause is that the beneficiary relied upon the advice of disinterested counsel sought in good faith after a full disclosure of the facts. Where a statute makes it a crime to fail to come forward with a document that appears to be the will of a decedent, a person will not forfeit a gift under a no-contest provision in another will if the will that person comes forward with is denied probate, so that the will containing the no-contest provision remains valid.

Illustration:

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

k. Effect of invalidity. When a restraint on contesting a will or other donative transfer, or on attacking particular provisions thereof, is found to be invalid under the rule of this section, the gift has the same effect as though the restraint had not been annexed.

The absolute character of the transfer resulting from the excision of the restraint is unaffected by the presence, in the dispositive document, of a clause disposing of the property remaining in the estate in the event that a prior transfer of such property should "lapse, fail or be declared invalid." The restraint alone having been stricken out, the gift itself has neither lapsed nor failed, nor has it been declared invalid.

l. Donative transfers other than wills. No-contest clauses and clauses restraining attacks on particular provisions appear more frequently in wills than in other donative transfers. In recent years, however, there has been an increase in the use of revocable inter vivos trusts as will substitutes. No-contest clauses and clauses restraining attacks on particular provisions in those trusts serve the same purpose as do such clauses in wills, and there is no justifiable reason for applying a different test to determine the validity of those clauses in the two comparable situations.

Donative transfers other than a will or a revocable inter vivos trust are likely to have an immediate permanence about them that is not attained by the will or the revocable trust until the transferor dies. This difference, however, does not cause clauses restraining contests of such instruments, or attacks on particular provisions of such instruments, to be subject to any different rules in regard to their validity.

STATUTORY NOTE TO SECTION 9.1

(Statutes as of January 1, 1982)

1. The statutes of many states follow the language of the Uniform Probate Code § 3–905 that "a provision in a will purporting to penalize any interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings." The statutes may apply to restraints on attacking particular provisions of the will, as well as contesting the entire will.

Alaska Stat. § 13.16.555 (1972)

Arizona Rev.Stat.Ann. § 14–3905 (1975)

Colorado Rev.Stat. § 15–12–905 (1974)

Hawaii Rev.Stat. § 560:3–905 (1976)

Idaho Code § 15–3–905 (1979)

Maryland Est. & Trusts Code Ann. § 4–413 (1974)

Michigan Comp.Laws Ann. § 700.168 (1980)

Montana Code Ann. § 72–2–519 (1981)

Nebraska Rev.Stat. § 30–24,103 (1979)

New Jersey Stat.Ann. § 3A:2A–32 (West Supp.1981)

North Dakota Cent.Code § 30.1–20–05 (1976)

Utah Code Ann. § 75–3–905 (1978)

2. The following statutes invalidate no-contest provisions in wills regardless of the grounds for the contest and of the existence of proba-

ble cause, and may apply to restraints on attacks on particular provisions:

Florida Stat. § 732.517 (1981)

Indiana Code § 29-1-6-2 (1976)

3. One statute provides that a no-contest provision in a will is valid regardless of the contestant's probable cause, except where probable cause exists for a contest on the grounds of forgery or of revocation by subsequent instrument and except under certain other circumstances set out below:

New York Estates, Powers & Trusts Law § 3-3.5 (McKinney 1981):

(a) A condition qualifying a disposition of property is operative despite the failure of the testator to provide for an alternative gift to take effect upon the breach or non-occurrence of such condition.

(b) A condition, designed to prevent a disposition from taking effect in case the will is contested by the beneficiary, is operative despite the presence or absence of probable cause for such contest, subject to the following:

(1) Such a condition is not breached by a contest to establish that the will is a forgery or that it was revoked by a later will, provided that such contest is based on probable cause.

(2) An infant or incompetent may affirmatively oppose the probate of a will without forfeiting any benefit thereunder.

(3) The following conduct, singly or in the aggregate, shall not result in the forfeiture of any benefit under the will:

(A) The assertion of an objection to the jurisdiction of the court in which the will was offered for probate.

(B) The disclosure to any of the parties or to the court of any information relating to any document offered for probate as a last will, or relevant to the probate proceeding.

(C) A refusal or failure to join in a petition for the probate of a document as a last will, or to execute a consent to, or waiver of notice of a probate proceeding.

(D) The preliminary examination, under SCPA 1404, of a proponent's witnesses in a probate proceeding.

(E) The institution of, or the joining or acquiescence in a proceeding for the construction of a will or any provision thereof.

3a. One statute provides that all conditions in terrorem are invalid, "unless there is a limitation over to some other person." (See Reporter's Note to this section, item 10).

Georgia Code Ann. § 113–820 (1975)

4. The following statutes take opposing positions on the operation of a no-contest provision on the interest of a minor or incompetent:

New York Estates, Powers & Trusts Law § 3–3.5 (McKinney 1981) (text quoted in item 3 above; infant or incompetent will not forfeit his interest if he opposes probate of a will which contains a no-contest provision).

Massachusetts Gen.Laws Ann. ch. 201, § 34 (West Supp.1981) (judgment against a guardian ad litem should be conclusive upon the person whom the guardian ad litem represents).

5. The following are examples of statutes which make it a crime to withhold or to conceal a will, but only if there is probable cause to believe that the will is valid:

Illinois Rev.Stat. ch. 110½, § 6–1 (1978)

New York Penal Law § 190.30 (McKinney 1975)

Wisconsin Stat. § 856.05(3) (1979)

6. Generally, mortmain statutes take two forms: prohibiting either charitable gifts contained in wills executed within a specified time period immediately preceding the testator's death or charitable gifts in excess of a fraction of the estate (one-fourth to one-half). The following statutes use the former approach, invalidating charitable gifts contained in wills executed within a specified period of time prior to the testator's death:

California Prob.Code § 22.1 (West Supp.1982) (gift to non-profit organization which has been appointed guardian of donor or conservator of his estate invalid if contained in will executed within six months of filing of petition for guardianship or conservatorship).

Florida Stat. § 732.803 (1981)

Idaho Code § 15–2–615 (1979)

The following statutes invalidate charitable gifts which are in an amount exceeding a specified fraction of the testator's total estate:

New York Estates, Powers & Trusts Law § 5–3.3 (McKinney 1981)

Ohio Rev.Code Ann. § 2107.06 (Page 1976)

The following statutes use some combination of a requirement that the charitable gift be executed prior to a specified time before the testator's death and a limit on the fraction of the estate which can be given to a charitable organization:

Georgia Code Ann. § 53–2–10 (1981)

Mississippi Code Ann. § 91–5–31 (1973)

The following mortmain statutes were held unconstitutional or repealed in response to doubt as to their constitutionality:

California Prob.Code §§ 40–43 (West 1956) which limited charitable gifts contained in wills executed within 30 days of death and/or in excess of one-third of testator's estate if certain relatives survived the testator, were repealed by Act of Nov. 4, 1971, ch. 1395, § 1, 1971 Cal.Stats. 2747.

District of Columbia Code Ann. § 18–302 (1973) (invalidated devise or bequest to religious leader or organization if devise made within 30 days of testator's death); Estate of French, 365 A.2d 621 (D.C.App.1976) (D.C.Code § 18–302 held unconstitutional on due process and equal protection grounds). A direct appeal to the Supreme Court of the United States in the French case was dismissed in Key v. Doyle, 434 U.S. 59, 98 S.Ct. 280, 54 L.Ed.2d 238 (1977), *rehearing denied*, 434 U.S. 1025, 98 S.Ct. 753, 54 L.Ed.2d 773 (1978), on the ground that the decision of the District of Columbia Court of Appeals was not reviewable by a direct appeal but only by writ of certiorari; Estate of Small, 346 F.Supp. 600 (D.D.C.1972) (D.C.Code § 18–302 held unconstitutional on the ground that it violated the First Amendment by discriminating against religion).

Idaho Code § 15–2–615 (1979) (invalidates charitable gift in will executed within 120 days of death of testator by other than accidental means). An earlier version of this statute was held partially unconstitutional. The statute was amended subsequently by Act of March 28, 1978, ch. 286, § 1, 1978 Idaho Sess.Laws 696, effective July 1, 1978.

Pennsylvania Const.Stat.Ann. tit. 20, § 2507 (Purdon Supp.1981) (invalidated charitable gift in will executed within 30 days of testator's death), repealed by Act of July 9, 1976, Act No. 135, § 8, 1976 Pa.Laws 551. Estate of Cavill, 459 Pa. 411, 329 A.2d 503 (1974) (Pa.Stat.Ann. tit. 20, § 2507 held unconstitutional on due process and equal protection grounds).

One mortmain statute has been deemed repealed by the state's adoption of the Uniform Probate Code:

Montana Code Ann. § 72–11–334 (1979) Repealed L.1981, § 195, ch. 575 (charitable gifts limited to one-third of testator's estate under will executed within 30 days of testator's death); Estate of Holmes, ___ Mont. ___, 599 P.2d 344 (1979) (mortmain statute conflicts with requirement that testator's intent control disposition of his property, Mont.Code Ann. § 72–1–102 (1979); if code conflicts with prior probate law, uniform code controls, Mont. Code Ann. § 72–1–106 (1979)).

Idaho has a mortmain statute, Idaho Code § 15–2–615 (1979), and has also adopted the Uniform Probate Code. Idaho has not ruled on whether they are in conflict with one another.

REPORTER'S NOTE TO SECTION 9.1

1. Comparison with present state of the law—The rule of this section is supported by statutes or judicial decisions in a majority of jurisdictions. In all jurisdictions, clauses restraining attacks on particular provisions receive the same treatment as no-contest clauses with regard to whether existence of probable cause affects the validity of such clauses. There is substantial support for the view that no-contest clauses should be upheld, even though the contestant had probable cause, unless the grounds for the contest are either revocation by a later will or forgery; this was the position taken by the first Restatement of Property. There is little authority supporting the application of the rule of this section to donative transfers other than wills. There is no indication in case law that any distinction should be drawn, in regard to the validity of no-contest clauses on the basis of the type of donative transfer document which contains such provisions.

2. Justification for the rule of this section—The justification for the rule of this section is stated in *Comment a*.

3. Judicial support for application of probable cause rule regardless of ground for contest—The position taken by this Restatement, that a no-contest condition is unenforceable against one who, with probable cause, contests a will or other donative transfer on any ground, is the law in a majority of American states. The Uniform Probate Code, which has been enacted in many states, has taken this approach (see the Statutory Note to this section) and many states have reached the same result through judicial decisions. Statutes in Florida and Indiana declare all such clauses invalid *per se*.

Most of the jurisdictions have explicitly adopted a probable cause rule, effective regardless of the grounds for contest. South Norwalk Trust Co. v. St. John, 92 Conn. 168, 101 A. 961 (1917) (state interest in ascertaining validity of will invalidates no-contest condition where probable cause shown); Wells v. Menn, 158 Fla. 228, 28 So.2d 881, 169 A.L.R. 892 (1946) (probable cause rule extends to contest on ground of undue influence); In re Cocklin's Estate, 236 Iowa 98, 17 N.W.2d 129, 157 A.L.R. 584 (1945) (adopting majority rule); In re Estate of Hartz v. Cade, 247 Minn. 362, 77 N.W.2d 169 (1956) (adopting majority rule; acknowledging state policy against "thwarting the course of justice" by deterring establishment of invalidity of instruments offered for probate); Matter of Estate of Seymour, 93 N.M. 328, 600 P.2d 274 (1979) (adopting probable cause rule; transferee had probable cause given "un-

resolved legal questions". Id. at 332, 600 P.2d at 278); Ryan v. Wachovia Bank & Trust Co., 235 N.C. 585, 70 S.E.2d 853 (1952) (probable cause and good faith for contest on any ground invalidates no-contest provision; courts should be as accessible to persons contesting wills as to persons seeking construction); *cf.* Whitehurst v. Gotwalt, 189 N.C. 577, 127 S.E. 582 (1925) (condition enforceable against contestant who lacked probable cause); Wadsworth v. Brigham, 125 Or. 428, 259 P. 299 (1927), *reaffirmed in* Wadsworth v. Brigham, 125 Or. 428, 266 P. 875 (1928) (good faith for contest sufficient to invalidate condition); In re Friend's Estate, 209 Pa. 442, 58 A. 853 (1904) (probable cause for contest on any ground invalidates condition regardless whether contest succeeds); Tate v. Camp, 147 Tenn. 137, 245 S.W. 839, 26 A.L.R. 755 (1922) (probable cause invalidates condition; if testator were insane or unduly influenced, document would not be testator's will and testator's intentions would not be defeated by finding of invalidity); Dutterer v. Logan, 103 W.Va. 216, 137 S.E. 1, 52 A.L.R. 83 (1927) (probable cause invalidates no-contest condition); In re Keenan's Will, 188 Wis. 163, 205 N.W. 1001, 42 A.L.R. 836 (1925) (contravenes state policy to require litigant to forfeit, where challenge fails, if probable cause existed). See 6 American Law of Property § 27.6 (A.J. Casner ed. 1952).

Courts of two jurisdictions have invoked the probable cause rule in proceedings involving wills and have suggested that the rule should apply to contests of wills on any grounds. As the Texas Court of Civil Appeals noted, "[t]he 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." Calvery v. Calvery, 122 Tex. 204, 212, 55 S.W.2d 527, 530 (Tex.Com.App.1932) (devisee received life estate; sold fee simple; sued for construction of will that would allow conveyance of fee; no-contest condition not violated). See also First Methodist Episcopal Church South v. Anderson, 110 S.W.2d 1177 (Tex.Civ.App.1937) (suit instituted by legatee to recover realty from testator's estate; no forfeiture worked: court held that suit was for construction and that legatee sued in good faith and with probable cause).

Washington has also apparently adopted the majority position. In re Estate of Kubick, 9 Wn.App. 413, 513 P.2d 76 (1973) (probable cause and good faith for suit to remove executor appointed in will would invalidate no-contest condition); In re Chappell's Estate, 127 Wn. 638, 221 P. 336 (1923) (probable cause for attack on provision placing entire estate in trust as violative of rule against perpetuities invalidated condition imposing forfeiture for contesting will "or any of its provisions").

Courts in South Carolina and Virginia, while not explicitly adopting the rule of this section, have strongly indicated that they would do so in a proper case. Rouse v. Branch, 91 S.C. 111, 74 S.E. 133 (1912) (holding that probable cause for contest on ground of forgery invalidates no-contest

provision; implying that probable cause for contest on any ground would invalidate such a condition); Womble v. Gunter, 198 Va. 522, 95 S.E.2d 213 (1956) (devisees contested will on ground of testamentary incapacity; no-contest provision upheld, court noting that contestants had failed to raise issue of probable cause below).

4. Judicial support for limitation of probable cause rule to cases where contestants allege either forgery or revocation by subsequent document—The courts of some jurisdictions invalidate no-contest conditions on a finding of probable cause only if the contestants have alleged either forgery or subsequent revocation. Courts thus limiting the probable cause rule reason that challenges on the basis of forgery or subsequent revocation are not "contests": the challenger is actually seeking to ascertain the true intent of the testator as expressed in a properly executed, unrevoked will. In re Estate of Lewy, 39 Cal.App.3d 729, 113 Cal.Rptr. 674 (1974) (probable cause for challenge of allegedly altered will; no-contest condition invalid); In re Bergland's Estate, 180 Cal. 629, 182 P. 277, 5 A.L.R. 1363 (1919) (good faith attempt to probate alleged subsequent will not violation of condition in previous will although subsequent will held forgery); Hurley v. Blankenship, 267 S.W. 2d 99 (Ky.1954) (probable cause for unsuccessful contest on grounds that testator had not executed will invalidated no-contest clause, but simultaneous challenge on grounds of undue influence and lack of testamentary capacity properly caused forfeiture); In re Kirkholder's Estate, 171 App.Div. 153, 157 N.Y.S. 37 (1916) (bad faith presentment of spurious will; no-contest condition violated because no criminal penalty for concealing false will). See the New York statute in item 3 of the Statutory Note to this section and 6 American Law of Property § 27.3 (A. J. Casner ed. 1952).

5. Judicial support for the validity of no-contest provisions regardless whether there was probable cause to contest—Limited judicial authority supports the position that no-contest provisions are valid without qualification. The following policy considerations, articulated in an early Alabama case, are often cited by the courts adopting this view: (1) the testator has a right to dispose of his property as he desires, so long as he violates no positive law or established public policy; (2) will contests tend to divide the family and cause disclosure of family secrets; (3) upholding no-contest provisions tends to discourage litigation, a result favored by public policy; and (4) prevention of dissipation of his estate through unnecessary litigation is a legitimate goal of a testator. Donegan v. Wade, 70 Ala. 501 (1881). See Lytle v. Zebold, 235 Ark. 17, 357 S.W.2d 20 (1962) ("Since the testator may leave his property to anyone he chooses he is at liberty to exclude from his bounty those beneficiaries who unsuccessfully seek to thwart his testamentary wishes." *Id.* at 18–19, 357 S.W.2d at 21); Elder v. Elder, 84 R.I. 13, 120 A.2d 815 (1956) ("[W]here there is no statute to the contrary and where the condition affixed to a testamentary gift violates no es-

tablished rule of law or public policy," condition is valid); Matter of Cronin, 143 Misc. 559, 257 N.Y.S. 496 (Sur.Ct.1932), *affirmed sub nom.* In re Will of Cronin, 237 App.Div. 856, 261 N.Y.S. 936 (testator may attach any condition to his gift); In re Breene's Will, 21 N.Y.S.2d 531 (Sur.Ct.1940) (conditions valid unless against public policy; unsuccessful contest for undue influence worked forfeiture). These New York cases, however, must be read in light of the New York statute quoted in the Statutory Note to this section, item 3, which makes such conditions unenforceable as against public policy when forgery or subsequent revocation are alleged.

Some courts, in holding that no-contest conditions are absolutely valid, have stressed the deleterious effect of will contests on familial relationships and the testator's reputation. Rudd v. Searles, 262 Mass. 490, 160 N.E. 882, 58 A.L.R. 1548 (1928) (contests infringe on family's privacy and belittle testator's reputation and good name at a time when he cannot defend himself); Bender v. Bateman, 33 Ohio App. 66, 168 N.E. 574 (1929) ("[I]n the great majority of cases [a contest] will result only in the affirmance of the will. But the family skeleton will have been made to dance." *Id.* at 70, 168 N.E. at 575). A California court required forfeiture in light of the testator's perceived intent, which was "to prevent all attacks upon his character, reputation, or sanity by dragging into publicity his private life, and . . . to secure to the beneficiaries whom he named, the fruits of his bounty." In re Mathie's Estate, 64 Cal.App.2d 767, 777, 149 P.2d 485, 490 (1944) (but see California cases cited in item 4 above: probable cause rule applied when forgery or subsequent revocation alleged).

A desire to minimize the volume of litigation before the courts has motivated several decisions upholding the uniform validity of no-contest conditions. In re Hite's Estate, 155 Cal. 436, 101 P. 443 (1909) (condition violated where devisee instituted contest but withdrew after settlement: "[A] condition such as this . . . meets with the approval of [public] policy [which] deplores litigation"). *Id.* at 439, 101 P. at 444) (but see California cases in item 4 above); In re Stewart's Will, 1 Con. 412, 5 N.Y.S. 32 (Sur. Ct.1889) (beneficiaries making agreements with contestants and attempting to testify for them forfeited; court noted that nothing can be more in conformity with good policy than to prevent litigation); Bradford v. Bradford, 19 Ohio St. 546 (1896) (court made same observation).

Some courts have offered a contrary reason for upholding no-contest conditions: they have claimed that such conditions did not deter assertion of legal rights. One court reasoned that no-contest conditions should be upheld without exception "for, as in the case at hand, the one restrained is not deterred from [contesting] by the resultant forfeiture of a share or interest which is his under the will, and thus there is no restraint upon him tending to the obstruction of judicial inquiry or the due course of justice." Alper v. Alper, 2 N.J. 105, 114, 65 A.2d 737,

741, 7 A.L.R.2d 1350, 1356 (1949) (presumably overruled by New Jersey's adoption of U. P. C., see Statutory Note to this section, item 1). Another court inferred, from the presence of the case before it, that a no-contest clause had not prevented the contestant from claiming his legal rights. Elder v. Elder, 84 R.I. 13, 120 A.2d 815 (1956). A New York court asserted that contestants are not penalized for bringing a contest, but only for failing to prove the allegations upon which the contest is based. In re Brush's Estate, 154 Misc. 480, 277 N.Y.S. 559 (Sur.Ct.1935), *affirmed sub nom.* In re Application of Brush, 247 App.Div. 760, 287 N.Y.S. 151 (1936) (affirmance based on finding of gift over).

Several courts have rested their decisions on the supposed unfairness of allowing a beneficiary to take under a will which he has unsuccessfully challenged. "It is the moral, economic rule, and the rule of written law, that one cannot both eat his cake and have it." Bender v. Batemen, 33 Ohio App. 66, 70, 168 N.E. 574, 575 (1929). A New Jersey court stated the reason more formally: it is a "rule of equitable construction that a person cannot accept and reject the same instrument, and there is an implied condition that he who accepts a benefit under it shall adopt the whole by conforming to all its provisions." Hoit v. Hoit, 42 N.J.Eq. 388, 391, 7 A. 856, 858 (1886) (overruled by statute; see Statutory Note to this section, item 1). See also Elder v. Elder, 84 R.I. 13, 120 A.2d 815 (1956) (inconsistent for beneficiary to claim "a gift from the bounty of a testator to which he had no original right, while at the same time attacking the validity of the instrument which makes the gift." *Id.* at 21, 102 A.2d at 819); Rossi v. Davis, 345 Mo. 362, 133 S.W.2d 363, 125 A.L.R. 1111 (1939) ("One cannot claim under a will and against it at the same time. He takes according to the will, or, so far as concerns the will, not at all." *Id.* at 380, 133 S.W.2d at 372, 125 A.L.R. at 1124). See also Commerce Trust Co. v. Weed, 318 S.W.2d 289 (Mo. 1958) ("strained or overtechnical construction" not applicable where it would amount to "refus[al] to give effect to the intent of the testator"; probable cause rule specifically rejected; *Rossi* reaffirmed).

Courts of the D.C. Circuit have affirmed in dicta the absolute validity of no-contest conditions. It is unclear from these opinions, however, whether the rule in that jurisdiction requires enforcement of such conditions where probable cause for contest on the grounds of forgery or subsequent revocation has been demonstrated. Barry v. American Security & Trust Co., 135 F.2d 470, 146 A.L.R. 1204 (D.C.Cir.1943) (contestant alleged lack of capacity, improper execution, and undue influence; bad faith shown; court noted in dicta that weight of authority supports validity of condition regardless of good faith); Sullivan v. Bond, 91 U.S.App.D.C. 98, 198 F.2d 529 (1952) (contestant alleged fraud, deceit, and undue influence; court affirmed decision requiring forfeiture, citing previous Restatement position that no-contest conditions were valid, regardless of probable

cause, where fraud, deceit or undue influence were alleged); Wilkes v. Freer, 271 F.Supp. 602 (D.D.C.1967) (construction suit; court noted in dicta that no-contest conditions were valid; held that bad-faith contest worked forfeiture; but refused to allow property to escheat to state and allowed heirs of contestants to take, despite terms of provision requiring contesting "party and his heirs" to forfeit, because no-contest condition lacked gift over, testator died intestate as to property in question, and heirs of contestants were also testator's only heirs at law).

Courts of two jurisdictions that adopted the Uniform Probate Code had previously held that no-contest provisions were valid without exception. These decisions were presumably overruled, at least in this respect, by the enactment of the Code (see the Statutory Note to this section, item 1). See, *e.g.*, Schiffer v. Brenton, 247 Mich. 512, 226 N.W. 253 (1929); Alper v. Alper, 2 N.J. 105, 65 A.2d 737, 7 A.L.R.2d 1350 (1949); Provident Trust Co. v. Osborne, 133 N.J.Eq. 518, 33 A.2d 103 (Ch. 1943); Hoit v. Hoit, 42 N.J.Eq. 388, 7 A. 856 (Ch.1886).

For a general discussion of the rules of the various jurisdictions, see 6 American Law of Property § 27.5 (A. J. Casner ed. 1952).

6. Grounds for invalidating no-contest provisions other than probable cause—Courts have not held no-contest provisions invalid per se as a matter of common law, although Indiana and Florida have reached that result by statute (see the Statutory Note to this section). Such restraints have been invalidated, however, where the scope of the restraint is so broad that it violates public policy. Thus, a condition imposing forfeiture if a beneficiary "invoke[s] the law of the land" or involves the estate in any litigation is invalid because it restricts free litigation of the beneficiary's rights, prevents suits for construction, and licenses the testator to make illegal devices. In re Kathan's Will, 141 N.Y.S. 705 (Sur.Ct.1913), *affirmed sub nom.* Milliken Brothers, Inc. v. New York, 215 N.Y. 750, 109 N.E. 1084 (1915). Similarly, a condition against "mak[ing] any opposition or controversy in any court of law or otherwise" is invalid, because to hold otherwise would prevent a beneficiary from suing even to enforce his legacy. Jackson v. Westerfield, 61 How.Pr. 399 (N.Y. Sup.Ct.1881). One court noted that "a right of devolution which enables a testator to shut the door of truth and prevent the observance of the law is a mistaken public policy." South Norwalk Trust Co. v. St. John, 92 Conn. 168, 101 A. 961 (1917).

Courts have been particularly reluctant to enforce restraints intended to prevent beneficiaries from seeking judicial construction of the terms of a will. Thus, a restraint requiring forfeiture if a beneficiary commenced any proceeding "to set aside this will or to seek any interpretation contrary to my intentions expressed herein" was held invalid. In re Ball's Will, 57 Misc.2d 683, 293 N.Y.S.2d 561 (Sur.Ct.1968). Another court held invalid a provision requiring any contestant to

reimburse the estate for the expenses of court proceedings when the executor sought to charge the beneficiary for the expenses of a construction suit. The court distinguished between conditions requiring reimbursement for proceedings to set aside the probate of a will and those requiring repayment of the expenses of construction suits; the former were enforceable, the latter, invalid. In re Vom Saal's Will, 82 Misc. 531, 145 N.Y.S. 307 (Sur.Ct.1913).

New Jersey courts have agreed that conditions requiring contestants to bear the expenses of both sides are valid as applied to attempts to prevent the probate of the wills containing such provisions. Guaranty Trust Co. v. Blume, 92 N.J.Eq. 538, 114 A. 423 (Ch.1921); Hoit v. Hoit, 42 N.J.Eq. 388, 7 A. 856 (Ch.1886). These cases may have been overruled by New Jersey's adoption of the Uniform Probate Code (see the Statutory Note to this section).

Courts have only infrequently given ambiguity as a ground for invalidating a no-contest condition. Even conditions requiring forfeiture for expressing "dissatisfaction" with a will have been enforced. Doyle v. Paul, 119 Ind. App. 632, 86 N.E.2d 98 (1949), *rehearing denied,* 119 Ind.App. 632, 87 N.E.2d 885 (condition enforced against contestant despite state statute invalidating no-contest conditions); In re Hickman's Estate, 308 Pa. 230, 162 A. 168 (1932) (condition enforced against contestant); *cf.* Roberts v. Chisum, 238 S.W.2d 822 (Tex.Civ. App.1951) (upholding validity of forfeiture condition for "becoming dissatisfied" with will, but refusing to enforce against beneficiary seeking construction). One New York court has, however, held such a condition invalid for ambiguity. In re Jackson's Will, 20 N.Y.S. 380 (Sur.Ct.1892) (noting that beneficiary had probable cause for challenge on ground of testamentary incapacity).

7. Conduct constituting violation of no-contest provision—Conditions requiring forfeiture of property have traditionally been construed very strictly by the courts. As the Kansas Supreme Court explained,

> It would be clearly against the policy of the law to extend the terms of a forfeiture of this character beyond the express terms of the condition itself. To do so would be to encourage forfeitures by construction. . . . For the purpose of defeating a forfeiture, the condition will be construed most strictly.

Wright v. Cummins, 108 Kan. 667, 672, 196 P. 246, 248, 14 A.L.R. 604, 608 (1921) (condition imposed forfeiture if beneficiary "by means of suit or otherwise, attempt[ed] to set this will aside, or otherwise interfer[ed] with the execution of the same as [testator left] it"; forfeiture of devised realty not required where beneficiary presented $600 claim against estate). See also Dutterer v. Logan, 103 W.Va. 216, 137 S.E. 1, 52 A.L.R. 83 (1927) ("[C]ourts of equity will give the strictest construction to provisions of forfeiture . . . and never enlarge upon them or struggle to uphold them." *Id.* at 226, 137 S.E. at 5, 52 A.L.R. at 90). Strict construc-

tion extends to the words of the restraint: the testator will be presumed to have intended the words he used to have their technical meaning "unless such usage would defeat the testamentary purpose plainly manifested in the context." Alper v. Alper, 2 N.J. 105, 65 A.2d 737, 7 A.L.R.2d 1350 (1949) (testatrix intended all beneficiaries to forfeit if any sued); *cf.* In re Mathie's Estate, 64 Cal.App. 2d 767, 149 P.2d 485 (1944) (beneficiary destroyed testator's final will; offered earlier will under which he took more; withdrew second will before probate hearing; held: condition against will contest violated).

Actions taken by beneficiaries with regard to a will can be arranged along a spectrum, from those which clearly do not invoke a no-contest condition to those which all courts would concede should work a forfeiture. This item will examine first those types of conduct which have been held not to constitute violations of no-contest conditions.

a. Proceedings for construction—Almost every court which has considered the question has supported the position taken by *Comment c* and held that a proceeding instituted to secure a judicial construction of a will, whether by means of a declaratory judgment action or otherwise, does not violate a no-contest condition. The reason given is that such suits are intended to ascertain the true intention of the testator rather than to frustrate that intention. Beneficiaries are generally permitted to assert, in such suits, constructions most favorable to themselves without fear of forfeiture although, as one authority has noted, "it is probable that more wills are emasculated by construction than by frontal attacks." 6 R. Powell, The Law of Real Property ¶ 856 (P. Rohan rev. 1979). In re Brisacher's Estate, 27 Cal.App.2d 327, 80 P.2d 1033 (1938) (executor/beneficiary's suit for construction and to forestall partial distribution); Griffin v. Sturges, 131 Conn. 471, 40 A.2d 758, 156 A.L.R. 972 (1944) (beneficiary's assertion of self-serving construction in administrator c. t. a.'s construction suit); Wells v. Menn, 158 Fla. 228, 28 So.2d 881, 169 A.L.R. 892 (1946) (legatee's action to settle rights and interests under will); Hicks v. Rushin, 228 Ga. 320, 185 S.E.2d 390 (1971) (declaratory judgment action to construe bequest); Knight v. Bardwell, 45 Ill.App.2d 332, 195 N.E.2d 428 (1963), *reversed on other grounds*, 32 Ill.2d 172, 205 N.E.2d 249 (1965) (suit to determine proper distribution of shares of stock under will); Geisinger v. Geisinger, 241 Iowa 283, 41 N.W.2d 86 (1950); In re Estate of Foster, 190 Kan. 498, 376 P.2d 784, 98 A.L.R.2d 795 (1962) (beneficiary asserted that testamentary trust violated rule against perpetuities); Dravo v. Liberty National Bank & Trust Co., 267 S.W.2d 95 (Ky.1954) (beneficiary brought declaratory judgment action to determine whether construction suit would violate condition); Black v. Herring, 79 Md. 146, 28 A. 1063 (1894) (imposing forfeiture for seeking construction would be unjust and "an anomaly in the law"); Mazzola v. Myers, 363 Mass. 625, 296 N.E.2d 481 (1973) (declaratory judgment action); Morrison v.

Reed, 6 N.J.Super. 598, 70 A.2d 799 (1950) (beneficiary offered interpretation contrary to that proposed by testamentary trustee); Girard Trust Co. v. Mueller, 125 N.J.Eq. 597, 7 A.2d 413 (Ch.1939) (beneficiary appeared as defendant in executor's construction suit); In re Mattes' Estate, 205 Misc. 1098, 130 N.Y.S.2d 270 (Sur. Ct.1954), *affirmed*, 285 App.Div. 867, 137 N.Y.S.2d 836 (1955). In re Mattes' Will, 309 N.Y. 942, 132 N.E.2d 314 (1955) (beneficiary's suit to ascertain amount of estate taxes he owed); In re Tinker's Estate, 157 Misc. 200, 283 N.Y.S. 151 (Sur.Ct.1935) (suit to identify proper legatee); Perry v. Perry, 175 N.C. 141, 95 S.E. 98 (1918) (testator devised house to executor in payment for services to estate; house sold before death; beneficiary's concurrence in executor's construction suit seeking payment not contest of will); Roberts v. Chisum, 238 S.W.2d 822 (Tex.Civ.App.1951); First Methodist Episcopal Church South v. Anderson, 110 S.W.2d 1177 (Tex.Civ. App.1937) (beneficiary's action asserting that, under proper construction, property devised to others by father's will had passed to beneficiary under mother's will).

As the cases cited above indicate, a wide variety of interests can be asserted in what is formally denominated a construction suit. Some courts have indicated, however, that the beneficiary cannot nullify a no-contest provision merely by claiming that the suit he has instituted is intended only to ascertain the testator's true intent, especially where the construction propounded by that beneficiary would eviscerate the will. In re Fellion's Estate, 132 Misc. 805, 231 N.Y.S. 9 (Sur.Ct.1928) (beneficiary/executors sought construction, claiming invalidity of will; claim quickly dropped; held: no forfeiture worked absent proof that "construction" suit was attempted to destroy rather than construe, will); Alexander v. Rhodes, 63 Tenn.App. 452, 474 S.W.2d 655 (1971) (construction suit violates no-contest provision where beneficiary's petition clearly states that he wants part of will stricken) (alternative holding). Beneficiaries seem particularly vulnerable in this regard when they have asserted that testamentary trusts violate the rule against perpetuities and should therefore be declared invalid: courts of two states have held that forfeiture provisions were triggered by unsuccessful assertions of this nature. Lanier v. Lanier, 218 Ga. 137, 126 S.E.2d 776 (1962) (declaratory judgment action; condition against "bring[ing] any action in any court to contest the validity of my will or any provision thereof"); Lytle v. Zebold, 235 Ark. 17, 357 S.W.2d 20 (1962) (condition against "institut[ing] proceedings to nullify, change or restrict any [provision] or . . . do[ing] any act for the purpose of impairing, setting aside or invalidating any [provision]"); Ellsworth v. Arkansas National Bank, 194 Ark. 1032, 109 S.W.2d 1258 (1937) ("should this will ever be contested"). The Arkansas courts may have been influenced by that state's rule upholding no-contest conditions regardless of probable cause (see item 5 above).

b. Proceedings to dismiss for lack of jurisdiction—Proceedings challenging the jurisdiction of a court to probate a will are not "contests" within the meaning of a no-contest clause. Presumably, the courts of every state will attempt to carry out the testator's wishes insofar as is legally possible, and "only when an opponent uses the appropriate machinery of the law to the thwarting of the testator's expressed wishes could his action be considered a contest." In re Crisler's Estate, 97 Cal.App.2d 198, 200, 217 P.2d 470, 471 (1950). In the *Crisler* case, the decedent's will was probated in Sacramento, California. Six months later, a beneficiary moved to dismiss the California proceedings, claiming that the decedent was an Oregon resident. The proponents of the will alleged that the beneficiary had violated a no-contest provision because the reason that she had attempted to remove the proceedings to Oregon was to take advantage of that state's policy with regard to will contests: Oregon adopts the majority opinion and will not enforce no-contest provisions where probable cause can be shown, whereas California will enforce such clauses if the contestant unsuccessfully alleges fraud, undue influence or lack of testamentary capacity (see items 3 and 4 above). The beneficiary's pleadings clearly revealed her belief that the testatrix was incompetent when the will was executed. The court nonetheless held that the proponents of the will had not proved that the beneficairy was seeking to probate the will in Oregon so that she could challenge it without risk of forfeiture, implying that if the proponents had so proved, the proceeding to dismiss would have constituted a contest and worked a forfeiture. By this reasoning, a forfeiture should also follow (as noted in *Comment c*) where a beneficiary, by means of a motion to dismiss for lack of jurisdiction, attempts to prevent a will witnessed by only two persons from being probated in a jurisdiction where such a will would be held to have been validly executed and thereby to force proponents to submit the will to probate in a jurisdiction where three witnesses are required. See also Maguire v. Bliss, 304 Mass. 12, 22 N.E.2d 615 (1939) (filing of special appearance and motion to dismiss Suffolk County probate on grounds that testator was a Barnstable County resident was not contest of will); In re Hill's Estate, 176 Cal. 619, 169 P. 371 (1917) (testator's daughter petitioned for letters of administration in Michigan, acknowledging existence, in California, of "instruments . . . purporting to be" testator's will; alleged wills offered in California by beneficiaries thereunder, in Michigan by testamentary trustee thereunder; daughter's filing of opposition to California probate held not will contest).

c. Forms of "opposition" to the will—The line between permitted participation in a will contest and that conduct which will constitute a contest and trigger a forfeiture under a no-contest provision is not a bright one. Initially, it may be said with some degree of certainty that (at least outside of those jurisdictions which hold val-

id provisions requiring forfeiture for expressing "dissatisfaction" with a will, see item 6 above) a beneficiary will not be required to forfeit a devise merely for expressing the wish that a contestant prevail. Lobb v. Brown, 208 Cal. 476, 281 P. 1010 (1929) (expectant heirs, unnamed in will, filed contest; attorney (for beneficiaries who were named as parties defendant) admitted in court that his clients would like to see contestants succeed; held: "[M]ere expression of a desire that contestants succeed" insufficient to work forfeiture); Richards v. Peifer, 229 Mich. 609, 201 N.W. 877 (1925) (beneficiary testified at trial that she would rather see contestants prevail than party unrelated to testatrix; held: no-contest provision not violated).

Failure to defend the will does not violate a no-contest condition. In re Layton's Estate, 217 Cal. 451, 19 P.2d 793, 91 A.L.R. 480 (1933) (beneficiaries named party defendants but not cited; no proof offered that they learned of contest before time to answer expired; held: condition against "acquiesc[ing] in or fail[ing] to contest" proceedings to set aside will not be violated); Van Brunt v. Osterlund, 351 Ill.App. 556, 115 N.E.2d 909 (1953) (beneficiaries, residents of Sweden, failed to appear when named as defendants; no forfeiture worked). Failure to cooperate in another's defense of the will does not violate a no-contest condition. Lobb v. Brown, 208 Cal. 476, 281 P. 1010 (1929) (expectant heirs, unnamed in will, filed contest; beneficiaries named as party defendants challenged their standing to sue but did not deny allegations that executor/beneficiary procured will by undue influence; executor/beneficiary claimed forfeiture under no-contest provision; held: beneficiaries "were under no obligation, legal or otherwise," to deny allegations); In re Estate of Momand, 13 Misc.2d 990, 177 N.Y.S.2d 115 (Sur.Ct.1958); *reversed on other grounds sub nom.* In re Momand's Will, 7 A.D.2d 280, 182 N.Y.S.2d 565 (1959) (proponents claimed beneficiary had "failed to cooperate"; criticized him for tenor of testimony while being examined as witness before trial; held: beneficiary under no duty to cooperate; forfeiture improperly imposed) (see the Statutory Note to this section, item 3).

Cross-examining the proponent's witnesses at a probate hearing does not trigger a forfeiture under a no-contest clause. In re Riegle's Estate, 10 Misc. 491, 32 N.Y.S. 168 (Sur.Ct.1894); In re Estate of Zurkow, 74 Misc. 2d 736, 345 N.Y.S.2d 436 (Sur.Ct. 1973). In the Zurkow case, the beneficiary was protected by a state statute (see the Statutory Note to this section, item 3). Absent such a statute, the result should be the same: any other rule would interfere with the probate court's task of ascertaining whether the instrument propounded truly represents the will of the testator.

Filing a caveat to the probate of the will may or may not violate a no-contest condition. The result, if the jurisdiction in which the will is offered for probate has adopted the majority rule, will depend upon whether probable

cause for the filing can be demonstrated. Wells v. Menn, 158 Fla. 228, 28 So.2d 881, 169 A.L.R. 892 (1946) (filing answer to probate petition and requesting formal proof of execution not will contest where probable cause shown); Lewis Estate, 19 Pa.Dist. 695 (Orphan's Ct.1910) (no contest where caveat filed with probable cause but appeal not taken); In re McCahan's Estate, 221 Pa. 188, 70 A. 711 (1908) (same). Two New Jersey cases, decided before that state adopted the Uniform Probate Code (see the Statutory Note to this section, item 1), illustrate the attitude of courts in jurisdictions which adhere to the rule that all no-contest conditions are valid toward beneficiaries who file caveats to wills: in both, the filings resulted in forfeiture. Kayhart v. Whitehead, 77 N.J.Eq. 12, 76 A. 241 (Ch.1910), *affirmed*, 78 N.J. Eq. 580, 81 A. 1133 (1911); Cross v. French, 118 N.J.Eq. 85, 177 A. 456 (Ch.1935), *modified*, 119 N.J. Eq. 563, 182 A. 834 (1936). The Nebraska Supreme Court took a reasonable approach to the problem in a case decided long before that state adopted the Uniform Probate Code. It found no "contest" where a beneficiary's challenge to the legal efficacy of a modified and republished will imposed no greater burden on proponents than did the state's wills statute. Scriven v. Scriven, 153 Neb. 655, 45 N.W.2d 760 (1951).

The position taken in *Comment e*, that the initiation of a proceeding intended to contest the will will invoke a forfeiture under a no-contest clause regardless whether the proceeding is abandoned thereafter, receives substantial judicial support. In re Holtermann's Estate, 206 Cal. App.2d 460, 23 Cal.Rptr. 685 (1962) (condition against "contest[ing] in any court" construed to include filing caveat alleging improper execution, testamentary incapacity, and undue influence, although caveat subsequently withdrawn); In re Fuller's Estate, 143 Cal.App.2d 820, 300 P.2d 342 (1956) (allegations of incapacity, undue influence, and lack of proper execution; withdrawn after hearing but before trial; Womble v. Gunter, 198 Va. 522, 95 S.E.2d 213 (1956) (30 beneficiaries filed caveat alleging testamentary incapacity; six withdrew at hearing; all forfeited); Donegan v. Wade, 70 Ala. 501 (1881) (beneficiary aided and assisted contestant's lawyers; violated condition against "resisting probate" of will despite contestant's dismissal before trial) (dicta); In re Simson's Estate, 123 N.J.Eq. 388, 196 A. 451 (Prerog. Ct.1938) (caveat filed to "procure [legatee's] legal right that the probate proceeding be heard before the orphan's court"; proceedings abandoned after offer and acceptance of settlement; condition violated).

A few courts have held otherwise, and have permitted beneficiaries to take where they withdrew their caveats. Drennan v. Heard, 198 F. 414 (N.D.Ga.1912), *affirmed*, 211 F. 335 (5th Cir. 1914) (wife filed caveat to husband's will; withdrew it ten days later and before hearing; court construed testator's intent as requiring forfeiture only after trial and final judgment); In Matter of Cronin, 143 Misc. 559, 257 N.Y.S. 496 (Sur.Ct.1932), *affirmed sub*

nom. In re Will of Cronin, 237 App.Div. 856, 261 N.Y.S. 936 (court held that proceedings before surrogate were not actions at law; that "contest" meant trial and decision on merits; and that surrogate's finding that will was "uncontested" was irrebuttable); Ayers' Administrator v. Ayers, 212 Ky. 400, 279 S.W. 647 (1926) (testator deeded farm to defendants six years before death; devised same farm to contestants; contestants filed appeal to probate of will and simultaneous suit in equity to cancel deeds; contestants dropped probate appeal when deeds found void; held: "The plaintiffs merely prepared to contest this will. No trial was ever had. All they did was get ready to contest it, but it was never contested." *Id.* at 403, 279 S.W. at 648).

The degree of assistance that a beneficiary may offer to parties who are actually contesting a will, without risking a forfeiture of that beneficiary's bequest, is unclear. Logically, if the jurisdiction has adopted the majority rule and the actual contestant has probable cause to contest the will, neither the contestant nor those who assist him should be penalized. No case on point has apparently yet arisen. The cases dealing with indirect will contests are from jurisdictions which enforce all no-contest conditions without exception (see item 5 above), apply the probable cause rule only when forgery or subsequent revocation are alleged (see item 4 above), adopted the majority rule only after the cases discussed below were decided, or have not yet been called upon to decide which approach to take. The existing case law does, however, support the position taken in *Comment f*: a beneficiary can be found to have violated a no-contest provision even though he is never formally named a party to the proceedings in which the will is challenged.

A number of courts have stated that a beneficiary who "[a]id[s], and instigat[es]" the actual contestant should be held to have violated a no-contest provision. Donegan v. Wade, 70 Ala. 501 (1881) (dicta). In re Estate of Pasternack, 52 Misc.2d 413, 275 N.Y.S.2d 703 (Sur.Ct.1966) (dicta). The boundaries of that aid, assistance and instigation are not well defined. One court held that a forfeiture was worked when a beneficiary secured witnesses, advised the contestant, and appealed (in his own name) a ruling adverse to the contestant. Kayhart v. Whitehead, 77 N.J.Eq. 12, 76 A. 241 (Ch.1910), *affirmed*, 78 N.J. Eq. 580, 81 A. 1133 (1911). Another held that a beneficiary who "encouraged and assisted" the contestant by securing witnesses and offering unsolicited documents to the contestant's attorneys did not forfeit his bequest despite his "continuously litigious and visibly spiteful" behavior. Saier v. Saier, 366 Mich. 515, 115 N.W.2d 279 (1962).

Beneficiaries who reach agreements with contestants before trial apparently run a great risk of being deemed contestants themselves. A beneficiary who agreed to testify for contestants in return for as much, if they were successful, as she would receive if the will were held valid forfeited her bequest. In re Stewart's Will, 1

Con. 412, 5 N.Y.S. 32 (Sur.Ct. 1889), as did a beneficiary who arranged with the proponent (her mother-in-law) and the contestants (the beneficiary's two children) to divide the testator's estate in a manner much more favorable to the beneficiary and contestants than that made by the will. The settlement was made after filing but before trial; the beneficiary's bequest, and those of the contestants, were held to have been forfeited. In re Simson's Estate, 123 N.J.Eq. 388, 196 A. 451 (Prerog. Ct.1938). Agreeing to pay a contestant's litigation expenses may be sufficient to invoke a no-contest condition, Haradon v. Clark, 190 Iowa 798, 180 N.W. 868 (1921) (dicta), although a beneficiary who actually paid the contestant's attorney's fees was allowed to take despite such a condition in the will. Lobb v. Brown, 208 Cal. 476, 281 P. 1010 (1929) (no indication that beneficiary agreed, at any time prior to judgment, to pay fees).

For cases dealing with the question whether the presentation by a beneficiary of an independent obligation of the transferor will invoke a forfeiture under a no-contest provision, see the Reporter's Note to Section 10.1, item 4.

8. Will contest instituted by person acting in representative capacity—Limited judicial authority supports the rule, stated in *Comment g*, that a beneficiary who is also a representative does not risk forfeiture of his bequest under a no-contest clause by contesting the will in his representative capacity. In Oglesby v. Springfield Marine Bank, 25 Ill.2d 280, 184 N.E.2d 874 (1962), a brother and sister who were granted life estates in certain realty by their mother's will claimed that their mother had deeded them that same realty in fee simple before she died. The brother predeceased his sister, and in his will appointed her testamentary trustee of his property interest. The remaindermen named in the mother's will filed suit against the sister in both her individual capacity and as trustee of her brother's estate, asserting that the deeds from the mother to her children were invalid. During the course of this litigation, the sister challenged certain provisions of her mother's will, and lost. In a subsequent suit, the remaindermen claimed that the sister, by challenging her mother's will, had forfeited her interest in the property bequeathed to her because of a no-contest condition in the will. The court held otherwise, noting that the sister might have violated her fiduciary duty as trustee by not asserting all available defenses in the earlier litigation. See In re Chew's Appeal, 45 Pa. 228 (1863) (two executor/devisees sued third devisee to regain possession of property allegedly owned by testator; devisee counterclaimed, alleging that, by suing him, devisee/executors forfeited their bequests under will; forfeiture condition not triggered by suit in representative capacity: "Being also devisees as well as executors, does not affect their right to act in their official character. . . . These rights are entirely separate and distinct." *Id.* at 232) (quoting from and approving trial court's opinion).

Two courts have held to the contrary, and have not allowed beneficiaries to sue in their representative capacities without being bound, as individuals, by the resulting judgments. The Missouri Supreme Court, which has held no-contest conditions valid without exception (see item 5 above), required a beneficiary to forfeit her bequest when, as administratrix of the estate, she attacked the testator's dispositive plan. Rossi v. Davis, 345 Mo. 362, 133 S.W.2d 363, 125 A.L.R. 1111 (1939) (testator placed all assets in inter vivos trust; beneficiary of trust secured appointment as administratrix of estate and instituted suit to recover assets held by trust but allegedly property of estate; no-contest clause in trust instrument violated despite maintenance of suit in representative capacity). See also Fouche v. Harison, 78 Ga. 359, 3 S.E. 330 (1887) (executor/beneficiary sought order restraining certain of his creditors from levying on his interest in estate; injunction granted; executor/beneficiary thereafter transfered his interest to other unrestrained creditors in satisfaction of his obligations to them; held: "[A]n executor who files [a] bill in his representative capacity is a party thereto in his individual capacity also, if as an individual he has a manifest interest in the subject-matter of the bill. . . . By filing such a bill, warning creditors into court, and forcing them to establish their priorities, he waives and renounces his legal right [as individual] to prefer some creditors to others at his mere will. . . . The court will not hold still while he skins." *Id.* at 410–11, 412, 3 S.E. at 334).

The rule stated in *Comment g*, that the institution of a will contest by a representative of an infant or incompetent beneficiary may work a forfeiture of that beneficiary's interest in any case where a competent beneficiary, suing on his own behalf, would have forfeited, is well supported. If the representative's contest is unsuccessful and is pursued without probable cause, and the will contains a no-contest provision, the beneficiary's interest is forfeited. The cases cited below all concerned infant beneficiaries. Moorman v. Louisville Trust Co., 181 Ky. 30, 203 S.W. 856 (1918) (next friend proposed to file will contest on grounds of undue influence and lack of capacity; court refused to permit filing, noting in dicta that the infant would be bound by the representative's actions, that infant would reach majority soon, and that she should be allowed to decide at that time whether to run the risk of forfeiture by contesting); Old Colony Trust Co. v. Wolfman, 311 Mass. 614, 42 N.E.2d 574 (1942) (guardian contested; infant beneficiary forfeited); Womble v. Gunter, 198 Va. 522, 95 S.E.2d 213 (1956) (30 beneficiaries, including three infants represented by next friends, joined in filing contest; six, including the infants, withdrew at hearing; all forfeited: "[I]n the absence of fraud an infant is as much bound by the decree of judgment of a court as an adult." *Id.* at 530, 95 S.E.2d at 219); *cf.* Perry v. Rogers, 52 Tex.Civ.App. 594, 114 S.W. 897 (1908) (will provided that "[i]f at any time any

[beneficiary] should attempt or should proceed in changing or breaking" will, all would forfeit; two beneficiaries refused to elect to take under will; all beneficiaries' interests forfeited, including that of minor, the court noting that "[i]f the forfeiture urged depended upon some act, or failure to act, on [the minor's] part there might be force in the contention [that he should not forfeit]." *Id.* at 598, 114 S.W. at 899); Alper v. Alper, 2 N.J. 105, 65 A.2d 737, 7 A.L.R.2d 1350 (1949) (gift over of all bequests "should any of [testatrix'] children or . . . grandchildren" contest, "regardless of whether or not they have in any way participated"; forfeiture of interests of infant beneficiaries upheld where one child contested).

In a jurisdiction which has adopted the rule of § 9.1, a guardian's suit will not cause a forfeiture of an infant beneficiary's interest if the guardian contested in good faith and with probable cause. Haley v. Pickelsimer, 261 N.C. 293, 134 S.E.2d 697 (1964) (dicta). The Haley court did not reach the question whether forfeiture would result if the guardian lacked probable cause for contest because the guardian had merely petitioned for construction of the terms of the will.

New York courts have refused to enforce no-contest provisions, in cases where the guardian of an infant beneficiary contests the will, on the ground that a state statute places the guardian under a duty to protect the rights of the infant (see the Statutory Note to this section, item 4). In re Andrus' Will, 156 Misc. 268, 281 N.Y.S. 831 (Sur.Ct.1935); Bryant v. Thompson, 59 Hun 545, 14 N.Y.S. 28 (1891), *affirmed*, 128 N.Y. 426, 28 N.E. 522, *reargument denied*, 30 N.E. 66 (1892). Because of this statute, the guardian may be held liable to the ward for failure to contest a will in a proper case. Bryant v. Tracy, 27 Abb.N.Cas. 183, 14 N.Y.S. 28 (Sup.Ct.1891) (construction suit; infant beneficiary held not to have forfeited bequest under no-contest clause where guardian unsuccessfully contested will on grounds of undue influence; although same suit instituted by adult would have worked forfeiture, guardian who believed in truth of allegations had to sue or be liable to ward for breach of fiduciary duty). A Michigan court reasoned along similar lines in refusing to enforce a forfeiture clause against an infant beneficiary where the guardian had contested the will on the order of a court. Farr v. Whitefield, 322 Mich. 275, 33 N.W.2d 791 (1948).

9. Provisions requiring beneficiaries who do not contest to forfeit their bequests in the event of any contest—The rule stated in *Comment h* has a substantial judicial support. A provision can be so drafted as to work a forfeiture of the interests of beneficiaries who do not contest in the event that other beneficiaries contest the will. Perry v. Rogers, 52 Tex. Civ.App. 594, 114 S.W. 897 (1908) ("If at any time any [beneficiary] should attempt or should proceed in changing or breaking my . . . will," then gift over of all beneficiaries' interests; two beneficiaries elected to take against will; all forfeited); Commerce Trust Co. v. Weed, 318 S.W.2d 289

(Mo.1958) (son unsuccessfully contested father's will; provision imposing forfeiture of interests of "descendants" of any contestant barred son's issue from taking either as descendants of contestant or directly as descendants of testator). If the testator's intent is sufficiently clear, even a contest initiated by a non-beneficiary will result in a forfeiture of the interests of beneficiaries. Alper v. Alper, 2 N.J. 105, 65 A.2d 737, 7 A.L.R.2d 1350 (1949) (testatrix specified that, should any of her children or grandchildren "institute or maintain any proceeding in any court, for the purpose of attacking the validity of this will, or for the purpose of affecting a disposition of my estate then in the specific manner aforementioned," all beneficiaries would forfeit "regardless of whether or not they have in any way participated"; contest instituted by non-beneficiary child caused forfeiture of all beneficiaries' interests).

Provisions of this nature, however, are strictly construed by the courts. In two cases where the contestant was a life beneficiary under the will and his issue were the remaindermen, the courts held that the life tenant's contest resulted in a forfeiture of his interest alone, and not those of the remaindermen. Cross v. French, 118 N.J.Eq. 85, 177 A. 456 (Ch. 1935), *modified*, 119 N.J.Eq. 563, 182 A. 834 (1936) (interest of "anyone so contesting" will to be revoked and estate to be distributed as if no bequest had been made "for the benefit of anyone so contesting"); Old Colony Trust Co. v. Wolfman, 311 Mass. 614, 42 N.E.2d 574 (1942) ("If any beneficiary . . . shall contest or dispute" will, any provision for that person "shall be of no effect and . . . all property which would have been covered by such provisions shall be . . . disposed of as a part of my residuary estate"). Furthermore, forfeiture of the beneficiary's interest under the will does not necessarily prevent the beneficiary from taking by action of law under an intestacy statute. Wilkes v. Freer, 271 F.Supp. 602 (D.D.C.1967) (all beneficiaries forfeited; no gift over; issue of contestants allowed to take under intestacy statute; state's claim to property by escheat denied). *Cf.* In re Succession of Kern, 252 So.2d 507 (La. App.1971), *affirmed*, 259 La. 1050, 254 So.2d 462 ("Should [will] be challenged or protested, in any way by any heir it becomes null and void and my entire estate is to be given to [X Charity]"; excluded expectant heir contested will; court excised "penal" provision and probated will "because [to do otherwise] was repugnant to law and good morals and cannot be sanctioned by the courts." Id. at 510.)

10. Effect of absence of gift over—The rule stated in *Comment i*, that no-contest conditions are valid and enforceable in the absence of a gift over if the testamentary language is sufficient to create a condition subsequent or executory limitation, is in force in most of the jurisdictions that have considered the matter. Many of the more modern decisions do not discuss gifts over at all, apparently assuming that there is no longer any valid reason to differentiate between no-contest provisions

with and those without gifts over. In the following cases gifts over were absent, but conditions were enforced nonetheless: In re Holterman's Estate, 206 Cal.App. 2d 460, 23 Cal.Rptr. 685 (Dist.Ct. 1962); In re Howard's Estate, 68 Cal.App.2d 9, 155 P.2d 841 (1945); Hurley v. Blankenship, 267 S.W.2d 99 (Ky.1954); Schiffer v. Brenton, 247 Mich. 512, 226 N.W. 253 (1929) (no-contest provisions held valid without exception; distinction between provisions with and without gifts over rejected) (presumably overruled by Michigan's adoption of Uniform Probate Code; see Statutory Note to this section, item 1); Burtman v. Butman, 97 N.H. 254, 85 A.2d 892 (1952) (no gift over necessary; no distinction between realty and personalty); Hoit v. Hoit, 42 N.J. Eq. 388, 7 A. 856 (1886) (noting but not accepting distinction between realty and personalty in regard to gifts over) (presumably overruled by New Jersey's adoption of Uniform Probate Code; see Statutory Note to this section, item 1); Whitehurst v. Gotwalt, 189 N.C. 577, 127 S.E. 582 (1925) (noting "artificial distinction" between realty and personalty); Elder v. Elder, 84 R.I. 13, 120 A.2d 815 (1956); see also In re Cocklin's Estate, 236 Iowa 98, 17 N.W.2d 129, 157 A.L.R. 584 (1945) (rejecting distinction between realty and personalty) (dicta).

As the cases cited above indicate, the courts still occasionally take note of the distinction, handed down from English law, between bequests of realty and personalty in regard to forfeiture clauses. At the time the distinction developed, the English common-law courts had jurisdiction over devises of realty; jurisdiction over bequests of personalty was vested concurrently in the ecclesiastical courts and the Courts of Chancery. The canon law, applied by the ecclesiastical courts and by the Courts of Chancery when dealing with personalty, generally required conditions subsequent to be accompanied by a gift over on breach in order to be enforceable. Absent a gift over, such conditions were construed to be in terrorem, that is, intended only to frighten a beneficiary but not to deprive that beneficiary of his bequest if he should breach the condition. Conditions calling for forfeitures of realty on breach of condition, on the other hand, were enforced by the common law courts regardless whether there was a gift over on breach. This distinction between realty and personalty was, for no apparent reason, imported into American jurisprudence. For discussions of this subject, see 6 American Law of Property § 27.2 (A. J. Casner ed. 1952); Moskowitz v. Federman, 72 Ohio App. 149, 51 N.E.2d 48, 27 O.O. 53 (1943); In re Cocklin's Estate, 236 Iowa 98, 17 N.W.2d 129, 157 A.L.R. 584 (1945); Whitehurst v. Gotwalt, 189 N.C. 577, 127 S.E. 582 (1925). This Restatement has rejected the in terrorem doctrine, and with it the distinction between realty and personalty: no-contest provisions requiring forfeiture of both realty and personalty are valid if properly phrased as a condition subsequent or special limitation, and are enforceable if a will contest is instituted without probable cause.

Some jurisdictions, most notably New York, still decline to enforce no-contest conditions, when the property involved is personalty, in the absence of a gift over. In re Arrowsmith, 162 App.Div. 623, 628, 147 N.Y.S. 1016, 1020 (1915), *affirmed*, 213 N.Y. 704, 108 N.E. 1089: "The general rule appears to be that in the case of a legacy of personal property [a no-contest] provision is merely *in terrorem* and not enforceable unless there be a gift over in case of breach, and that a general gift of the residue is not a gift over. [citation omitted]. The rule seems to be otherwise in the case of a devise of realty . . . ." See also In re Marshall's Estate, 119 Misc. 407, 196 N.Y.S. 330 (Sur.Ct. 1922); In re Folsom's Will, 142 N.Y.S.2d 144 (Sur.Ct.1955), *affirmed*, 6 A.D.2d 691, 174 N.Y.S.2d 116 (1958), *affirmed*, 6 N.Y.2d 886, 190 N.Y.S.2d 381, 160 N.E.2d 857 (1959) (dicta). As the *Arrowsmith* case indicates, the New York courts hold that a bequest of the residue of an estate will not be construed as a gift over: the forfeited share must be bequeathed to a named party or the instrument must "especially [direct] that the share of the person violating the condition shall fall into the residue." In re Von Grimm's Will, 133 N.Y.S.2d 926 (Sur.Ct.1954). The Supreme Court of Georgia adopted a similar rule, Linkhous v. National Bank of Georgia, 247 Ga. 274, 274 S.E.2d 469 (1981) (in event no contest clause violated by beneficiary, "property and estate disposed of . . . as if beneficiary had predeceased [testator]" held invalid for failing to name "some person" as per Georgia Statute (See Statutory Note to this section, item 3a)) as has a Virginia court, Fifield v. Van Wyck's Executor, 94 Va. 557, 27 S.E. 446 (1897). The distinction between realty and personalty may still be valid in South Carolina and Florida as well. See, *e.g.*, Sherwood v. McLaurin, 103 S.C. 370, 88 S.E. 363 (1916) (court noted both absence of gift over and presence of probable cause in refusing to enforce no-contest condition where daughter of testator accepted bequest, then presented claim against estate for services rendered to testator); Wells v. Menn, 158 Fla. 228, 28 So.2d 881, 169 A.L.R. 892 (1946) (absent gift over, no-contest condition not enforceable where good faith and probable cause shown).

The Supreme Court has mentioned the in terrorem doctrine in two cases. In the first, a provision of the will gave the executor of the estate the final power to construe the testator's intention as manifested therein. The Court noted in dicta that, absent a gift over, a condition imposing forfeiture for challenging the executor's interpretation would be unenforceable. Pray v. Belt, 26 U.S. (1. Pet.) 670, 680, 7 L.Ed. 309 (1828) (only personalty involved). In Smithsonian Institute v. Meech, 169 U.S. 398, 18 S.Ct. 396, 42 L.Ed. 793 (1898), the Court upheld a no-contest clause in a case involving personalty where there was a gift over; the distinction between realty and personalty was not commented upon. Nonetheless, a federal judge sitting in a diversity case later refrained from enforcing a no-contest

clause despite the presence of a gift over. A wife filed a caveat to her husband's will alleging incapacity, undue influence, improper execution, and that her husband had devised to others property that rightfully belonged to her. The caveat was withdrawn after ten days and before the hearing; the judge held that the testator's intention was that no forfeiture should result unless the case went to trial and a final judgment was entered. Drennen v. Heard, 198 F. 414 (N.D.Ga.1912), *affirmed*, 211 F. 335 (5th Cir. 1914) (provision required forfeiture if wife "took any legal steps to set aside this will"; both personalty and real property were at stake).

Absence of a gift over may result in partial intestacy, allowing parties who have forfeited their devises under a no-contest clause to take under a local intestacy statute. See, *e.g.*, Wilkes v. Freer, 271 F.Supp. 602 (D.D.C.1967) (bequest of remainder interest in personalty; beneficiaries forfeited despite lack of gift over when they contested; issue of beneficiaries allowed to take under intestacy statute despite testator's expressed intention to disinherit "heirs" of contestants and despite state's claim that property had escheated to it).

Limited judicial authority supports the rule stated in *Comment i* that in cases where the testator's intent is ambiguous, the presence of a gift over indicates that he intended the no-contest clause to be enforceable. In re Chamber's Estate, 322 Mo. 1086, 18 S.W.2d 30, 67 A.L.R. 41 (1929).

11. Existence of probable cause—The rule stated in *Comment j*, that finding of probable cause is aided where a party has been advised to sue by his attorney, finds support in the cases. The courts generally require that the contestant have made full and fair disclosure to the attorney before proceeding on his advice. In re Estate of Kubick, 9 Wn.App. 413, 513 P.2d 76 (1973) (that contestant laid facts fully and fairly before counsel and acted on counsel's advice in instituting suit indicates good faith and probable cause); Dutterer v. Logan, 103 W.Va. 216, 137 S.E. 1, 52 A.L.R. 83 (1927) (proceeding "based on facts honestly obtained and fully disclosed" to counsel; probable cause found); *cf.* In re Friend's Estate, 209 Pa. 442, 58 A. 853 (1904) (testimony of attorney that he advised contest given no weight in determination whether probable cause existed).

12. Effect of invalidity—That invalidation of a no-contest provision will not affect the validity of a testamentary devise is the rule in American jurisdictions. Whether invalidation is called for by the scope of the provision, the ambiguity of the language, or the contestant's probable cause for the contest, the gift remains valid.

Courts which have invalidated a condition against contest because of the overbreadth of the condition have upheld the gift involved. In re Ball's Will, 57 Misc. 2d 683, 293 N.Y.S.2d 561 (Sur.Ct. 1968) (invalid condition restraining construction suits); In re Vom Saal's Will, 82 Misc. 531, 145 N.Y.S. 307 (Sur.Ct.1913) (invalid condition requiring beneficiary to

pay executor's or trustee's expenses for construction suit); In re Kathan's Will, 141 N.Y.S. 705 (Sur.Ct.1913), *affirmed sub nom.* Milliken Brothers, Inc. v. New York, 215 N.Y. 750, 109 N.E. 1084 (1915) (invalid condition not to dispute will nor invoke law against will or estate).

The excision, for ambiguity, of a no-contest provision will not affect the remainder of the testamentary plan. In re Jackson's Will, 1 Pow. 241, 20 N.Y.S. 380 (Sur.Ct.1892) (invalidity of condition that person dissatisfied with will forfeits his interest does not affect bequests to named beneficiaries).

Courts which have invalidated no-contest provisions because of the beneficiary's good faith or probable cause for contest have upheld the conditional devises involved. When a court invalidates such a provision and holds that the contesting beneficiary does not forfeit his interest, the court holds in effect that the invalidity of the forfeiture restraint does not affect the validity of the devise. See cases cited in items 3 and 4 above.

13. Validity of restraints on attacking particular provisions—The majority of restraints on attacking particular provisions appear in conjunction with restraints on contesting the will. Jurisdictions which uphold the validity of no-contest provisions regardless of probable cause (see item 5 above) deal similarly with restraints on attacking particular provisions. Lytle v. Zebold, 235 Ark. 17, 357 S.W.2d 20 (1962) (suit framed as one for construction; beneficiary attacked testamentary trust as, *inter alia*, violative of rule against perpetuities; forfeiture worked); Sullivan v. Bond, 91 U.S.App.D.C. 98, 198 F.2d 529 (1952) (will and two codicils executed; beneficiary challenged codicils on grounds of fraud, deceit, and undue influence; jury found that first codicil resulted from undue influence but that the second was valid; beneficiary forfeited despite probable cause for attack); Lanier v. Lanier, 218 Ga. 137, 126 S.E.2d 776 (1962) (beneficiary attacked provisions of will as violative of rule against perpetuities; lost; forfeited). Jurisdictions which uphold no-contest provisions except as applied to cases where contestants allege forgery or subsequent revocation (see item 4 above) apply a similar rule to restraints on attacking particular provisions. In re Estate of Goyette, 258 Cal.App.2d 768, 66 Cal.Rptr. 103 (1968) (residuary legatees filed "construction" suit alleging that testamentary charitable gifts exceeded statutory maximum; interests forfeited; since former legatees were not heirs-at-law, they thereafter lacked standing to challenge charitable bequests).

As two of the cases cited above indicate, simply labeling a proceeding as a "construction suit" will not necessarily protect the party bringing suit from forfeiture under a clause restraining attacks on particular provisions. The court in *Estate of Goyette* reasoned that the testator could have rendered his charitable bequests immune from attack under the California mortmain statute (since repealed; see Statutory

Note to this section, item 6) by giving the contestants specific rather than residuary bequests: to allow those beneficiaries to evade the forfeiture provision by labeling their suit one for construction "would not only place a premium on draftsmanship but would be illogical and unrealistic." *Id.* at 775, 66 Cal.Rptr. at 108. In most jurisdictions, however, and especially in those which have adopted the probable cause rule, institution of proceedings even colorably intended to result in judicial construction of the will does not work a forfeiture under a no-contest or no-attack provision. See the cases cited in item 7a above; White v. White, 105 N.J. Super. 184, 251 A.2d 470 (1969) (executor's construction suit; beneficiary's successful challenge of one clause of will as violating rule against restraints on alienation did not trigger forfeiture which was to occur in the event "any provision [of will] is contested"); In re Harrison's Estate, 22 Cal. App.2d 28, 70 P.2d 522 (1937) (successful attack on certain dispositive provisions of will as contrary to statutory rule against perpetuities not violation of clause against "impair[ing] or invalidat[ing] any . . . provision" where suit deemed one for construction); Calvery v. Calvery, 122 Tex. 204, 55 S.W.2d 527 (Tex. Com.App.1932) (beneficiary sued for construction of will that would give her fee rather than life estate; no forfeiture worked).

In jurisdictions which accept the probable cause rule, a beneficiary's attack on a provision of a will on the ground that it violates the rule against perpetuities does not invoke forfeiture under a clause restraining attacks on particular provisions if the beneficiary has probable cause for filing suit. This is true whether the suit was successful (in which case probable cause has been demonstrated), Colorado National Bank v. McCabe, 143 Colo. 21, 353 P.2d 385 (1960); In re Estate of Foster, 190 Kan. 498, 376 P.2d 784, 98 A.L.R.2d 795 (1962), or unsuccessful (in which case a further finding as to the existence of probable cause is necessary). In re Chappell's Estate, 127 Wash. 638, 221 P. 336 (1923); Burtman v. Butman, 97 N.H. 254, 85 A.2d 892 (1952) (dicta) (noting that attack on provision as violative of public policy, made in good faith and with probable cause, would not work forfeiture). Courts in jurisdictions which uphold no-contest provisions without reservation have reached contrary decisions. See, *e.g.*, Lanier v. Lanier, 218 Ga. 137, 126 S.E.2d 776 (1962); Lytle v. Zebold, 235 Ark. 17, 357 S.W.2d 20 (1962); *cf.* Rossi v. Davis, 345 Mo. 362, 133 S.W.2d 363, 125 A.L.R. 1111 (1939) (beneficiary's attack on trust as violative of rule against perpetuities did not prevent court from enforcing restraint in trust instrument where beneficiary attacked trust on other grounds as well).

The courts of those states which have enacted mortmain statutes (see the Statutory Note to this section, item 7) have generally held that a beneficiary's invocation of his rights under such a statute does not work a forfeiture under clauses written to restrain will contests or attacks on particular provisions. Unger v. Loewy,

202 App.Div. 213, 195 N.Y.S. 582 (1922), *reversed on other grounds*, 236 N.Y. 73, 140 N.E. 201 (1923) (testator cannot avoid effect of statute intended to protect surviving widow and next of kin through limiting charitable bequest by inserting restraint on attacks); But see In re Estate of Eckart, 39 N.Y.2d 493, 384 N.Y.S.2d 429, 348 N.E.2d 905 (1976); In re Estate of Basore, 19 Cal.App.3d 623, 96 Cal.Rptr. 874 (1971) (provision calling for forfeiture for "oppos[ing] or contest[ing]" will not be effective where beneficiary instituted suit to determine whether charitable bequest excessive under statute); *cf.* In re Estate of Goyette, 258 Cal.App.2d 768, 66 Cal.Rptr. 103 (1968) (condition against "contest[ing] this will or object[ing] to any of its provisions"; beneficiaries forfeited when they instituted "construction" suit to invalidate charitable bequest as excessive under statute). See Kirkbride v. Hickok, 155 Ohio St. 293, 98 N.E.2d 815, 44 O.O. 297 (1951) (construction suit; beneficiaries challenged charitable bequest as excessive under statute; court held no forfeiture worked: "No action of testator's children made the gifts to the charities invalid; the statutory law of Ohio accomplished that." *Id.* at 302, 98 N.E.2d at 820, 44 O.O. at 301).

Courts have, on occasion, refused to enforce restraints on attacking particular provisions where beneficiaries have alleged violations of statutes and rules other than those involving charitable gifts or perpetuities. In re Folsom's Will, 142 N.Y.S.2d 144 (Sur.Ct.1955) (testator attempted to deny executor statutory compensation through forfeiture clause; clause unenforceable as against public policy where statute allows renunciation of compensation specified in will in favor of statutory compensation); Mallet v. Smith, 27 S.C.Eq. (6 Rich. Eq.) 12 (1853) (challenge to validity of testamentary bequest of slaves as contrary to state law and policy; no violation of forfeiture condition against "express[ing] any dissatisfaction with any disposition . . . herein made"). See In re Estate of Spencer, 232 N.W.2d 491 (Iowa 1975) (probable cause for successful contest of provision on ground that it was excessive and void exercise of special power of appointment; no-contest clause not triggered).

14. No-contest provisions in donative transfer documents other than wills—Missouri is the only state whose appellate courts have dealt with no-contest clauses in donative transfer documents other than wills. Missouri courts take the position that no-contest provisions in wills are valid and enforceable without qualification, and hold similarly with respect to such clauses in trust instruments. The holdings of these courts provide some support for applying § 9.1 to other than wills in that the same rule applies in Missouri to both restraints on will contests and restraints on contests of the provisions of other donative transfer documents.

In Missouri, no-contest conditions in wills are strictly enforced; so too with similar forfeiture provisions in trust instruments. Hillyard v. Leonard, 391 S.W.2d 211,

20 A.L.R.3d 820 (Mo.1965) (dicta) (forfeiture condition against bringing any action for partition and distribution of trust assets valid and enforceable); Cox v. Fisher, 322 S.W.2d 910 (Mo.1959) (dicta) (no-contest condition is valid where testator clearly intended that beneficiary's conduct should result in forfeiture); Rossi v. Davis, 345 Mo. 362, 133 S.W.2d 363, 125 A.L.R. 1111 (1939) (no contest condition valid despite assertion that such condition violates public policy). Although probable cause for contest plays no role in Missouri courts' determinations whether beneficiaries' actions have violated no-contest conditions, the courts have strictly construed these conditions. Cox v. Fisher, 322 S.W.2d 910 (Mo.1959) (restraint against "contest" not enforced against beneficiaries who joined trustor's guardian's suit to set trust aside); Hillyard v. Leonard, 391 S.W.2d 211 (Mo. 1965) (restraint against seeking judicial partition inapplicable where trust purposes fulfilled).

The court in one Missouri case held, contrary to the rule stated in *Comment g*, that a beneficiary who contested the trust instrument in a representative capacity forfeited her own interest under the trust. The settlor had placed all of his assets in an inter vivos trust. The beneficiary, one of his daughters, had herself appointed the administratrix of his nonexistent estate for the purpose of "discovering" and acquiring the assets which she knew were held in trust. By instituting suit to recover those assets, she forfeited her interest under the trust. The Missouri court further held that, consistent with *Comment h*, the interests of the beneficiary's children were also forfeited, although they took no part in the suit, because the settlor intended that the parent's contest should cause the children's interests to terminate. Rossi v. Davis, 345 Mo. 362, 133 S.W.2d 363, 125 A.L.R. 1111 (1939).

§ 9.2 Restraints on Attacks on Fiduciaries

An otherwise effective provision in a will or other donative transfer, which is designed to prevent the acquisition or retention of an interest in property in the event the propriety of the performance of the fiduciary with respect to the administration of the transferred property is questioned in a legal proceeding, is valid, unless the beneficiary had probable cause for questioning the fiduciary's performance.

Comment:

a. Rationale. Having validly set forth a dispositive plan the transferor may seek to protect the executors or trustees, who have been designated by the transferor to administer the plan, from justifying in legal proceedings the performance of