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#L-1010

Memorandum 86-17

Subject: Study L-1010 - Estates and Trusts Code (Opening Estate Administration--no contest clauses)

In connection with the development of the portion of the new Estates and Trusts Code relating to the opening of estate administration, the Commission has decided to give some attention to the law governing the effect of no-contest clauses in wills and other instruments. At the January 1986 meeting in Sacramento the Commission began an initial review of this subject, and felt that the concept of codifying some of the relevant rules should be investigated. The Commission also suggested the possibility of assessing attorney's fees instead of a forfeiture in the case of a good faith contest. However, the Commission deferred further consideration of these matters pending receipt from Professor Niles of a memorandum concerning no-contest clauses.

Attached to this memorandum is Professor Niles' memorandum. His memorandum reviews the policy considerations involved with no-contest clauses and the trend in the law towards a probable cause exception. Professor Niles suggests, however, that before the Commission thinks about imposing a probable cause exception, it should carefully review the problems involved with the probable cause exception. He offers an alternative approach based on equitable court relief from forfeiture. The considerations involved are set out in Professor Niles' memorandum.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

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Memorandum

To: Law Revision Commission Feb. 2, 1986

From: Russell D. Niles

The latest and most complete study of no-contest provisions and related topics may be found in the Donative Transfers part of the recent Restatement of Property 2d, approved by the American Law Institute in 1983. Chapter Nine relates to restraints on contests (§ 9.1),[1] and to restraints on attacks on fiduciaries (§ 9.2).[2] Since these restraints tend to restrict access to the courts, they involve issues of public policy. Chapter Ten relates to restraints on claims against the transferor or the transferor's estate (§ 10.1)[3]

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[1]Section 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.

[2]Section 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.

The Reporter's Note cited In re Andrews' Will, 156 Misc. 268, 281 N.Y.S. 831 (Sur. Ct 1935). The Reporter also referred to In re Estate of Bullock, 264 Cal. App. 2d 197, 70 Cal. Rptr. 239 (1968); In re Miller's Estate, 230 Cal. App. 2d 888, 41 Cal. Rptr. 410 (1964); and In re Blackburn's Estate, 115 Cal. App. 576, 2 P.2d 191 (1931).

[3]Section 10.1. Restraints on Enforcing Obligations of Transferor or Transferor's Estate

An otherwise effective provision in a will or other donative transfer, which is designed to prevent the acquisition or retention of

and to provisions that compel an election between property already owned and benefits given in a donative transfer (§ 10.2).[4] These two sections involve the relative rights of persons but the public interest is neutral.

The new Restatement furnishes an excellent framework against which to analyse and classify the various restraints that donors impose on donees to protect the donors' estates. Many over-broad no-contest clauses employed by California draftsmen attempt to restrain beneficiaries from contests, attacks, and all types of claims. Public policy is concerned only with certain restraints. A donor can provide that a donee will lose his or her legacy if he or she sues the estate for a valid (or an invalid) obligation. A donor may compel a donee to elect between benefits under a will or his or her valid (or invalid) claim to community property.

All four sections fairly represent California law with one important exception: § 9.1 changes the rule adopted by the first Restatement[5] and provides that a beneficiary who contests a will or other donative transfer will not forfeit his or her interest if he or she had probable cause. For a century the State Supreme Court has

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an interest in property if there is an attempt to enforce an independent obligation of the transferor or the transferor's estate, is valid.

The Reporter's Note cited In re Madonsky's Estate 29 Cal. App. 2d 685, 85 P.2d 576 (1938); In re Kitchen's Estate, 192 Cal. 384, 220 P. 220 P. 301 (1923).

[4]Section 10.2. Restraints on Asserting Right to Other Property Owned or Disposed of by Transferor

An otherwise effective provision in a will or other donative transfer which imposes a condition precedent to the interest of a beneficiary that the transfer, if accepted, is in lieu of an interest in other property owned or disposed of by the transferor, is valid.

The Reporter's Notes cite Morrison v. Bowman, 29 Cal. 337 (1865); in re Howard's Estate, 68 Cal. App. 2d 9, 155 P.2d 841 (1945), and In re Estate of Kazian 59 Cal. App. 3d 797, 130 Cal. Rptr. 908 (1974).

[5]Section 428.

adhered to the view that probable cause would not avoid a forfeiture under a traditional no-contest clause if a beneficiary contested a will on grounds such as lack of testamentary capacity, undue influence, or defective execution.[6]

The first Restatement adopted a partial probable-cause rule where the contest was based on forgery, or revocation by subsequent instrument. California now is in accord,[7] and does not penalize a beneficiary who seeks a construction of a will,[8] or objects to the jurisdiction of the court.[9]

The difference between the first and second Restatements is a narrow one. Both Restatements agree that the public interest requires the rejection of a forged will, and the testator would agree. The testator would also want his latest will to prevail. But if a testator deliberately imposes a condition of forfeiture on a beneficiary who claims that the testator is of unsound mind, has insane delusions, lacks independent judgment because of undue influence, or has not properly executed a will, then should the testator's intention be respected? Of course, if the contest succeeds, there is no penalty. Forfeiture occurs only when a contest fails.

If the Commission is persuaded that it is now time to reconsider the established law in California, it is probably necessary to seek a statutory solution. There are two recent models to consider.

In 1965 the New York Temporary State Commission on the Modernization, Revision and Simplification of the Law of Estates, considered the policy issues involved and rejected the probable cause rule except for contests on the ground of forgery or revocation by

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[6]Hite's Estate, 155 Cal. 436, 101 P. 443 (1909); Miller's Estate, 156 Cal. 119, 103 P. 843 (1909).

[7]See cases cited in Garb, The In Terrorem Clause: Challenging California Wills, 6 Orange County B.J. 259 (1979), attached to Memorandum 85-53 (11/12/85).

[8]Estate of Zappettini, 223 Cal. App. 2d 424, 35 Cal. Rptr. 844 (1963).

[9]Estate of Crisler, 97 Cal. App. 2d 198, 217 P.2d 470 (1950).

subsequent will.

On the recommendation of the Commission New York adopted § 3-3.5 of the New York Estate Powers and Trust Law which reads as follows:

> § 3-3.5. Conditions qualifying dispositions; conditions against contest; limitations thereon
>
> (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 preceeding for the construction of a will or any provision thereof.

In 1969 the Uniform Probate Code was approved by the Conference of Commissioners on Uniform State Laws and the American Bar Association. Section 3-905 provides 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." Twelve states have adopted the Uniform Probate Code.[10]

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[10]See Statutory Note to § 9.1, Donative Transfers, p. 353.

Most legal scholars favor the probable-cause rule, although most concede that very few contests succeed. The most searching study of the English and American cases may be found in the articles written by Professor Olin D. Browder[11] of the University of Michigan (and now a visiting Professor at Hastings and available for discussions with the Commission). Professor Browder wrote the Chapter on Illegal Conditions and Limitations for the American Law of Property. The subsection on policy considerations involved in no-contest clauses is attached to this memorandum as an Appendix.

The Commission might well conclude that the probable-cause rule, now that it has been adopted by the courts or legislatures of more than half of the states, should now be proposed to the California legislature. Before the Commission reaches that decision, however, it might wish to consider the questions raised by members of the American Law Institute when § 9.1 was debated at the Annual Meeting in 1981.[12] A strong minority of the members preferred the statute recommended by the New York Temporary Commission.

Among the questions debated were the following:

1. What does "probable cause" mean? What are some illustrations of the standard? The only illustrations in the Restatement indicate that inequality of division is not enough. Is the standard less than "substantial likelihood of success." Some members thought that by analogy to the phrase as used in other branches of the law, the standard was not high enough to prevent contests for the purpose of obtaining a settlement.

2. At what time must the relevant facts on which a contest is based be known? At the time the will is offered? After the contest? At the time of the decree of distribution?

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[11]Conditions Against Contests, 26 Mich. L. Rev. 1066 (1938); Testamentary Conditions Against Contests Reexamined, 49 Colum. L. Rev. (1949).

[12]See Proceedings Annual Meeting of the American Law Institute 1981.

3. When should the court decide whether or not the contestant had probable cause? Should there be a preliminary hearing to decide the issue? If so should the cost be charged to the estate?

4. In a preceding to determine whether the contestant had probable cause, who has the burden of proof? Is the issue for a judge or for a jury?

After an extended debate but before the final vote a statement was made by Hon. Charles D. Breitel, formerly Chief Judge of the New York Court of Appeal, which expressed the view of a strong minority of the members:

> Mr. Chairman, Professor Casner, I came to this meeting as a very conservative pessimist with regard to liberalizing access to the courts in these matters. As I have listened to the discussion, I have lost whatever doubts I had as to the rightness of the sense that I had when I came. The discussion indicates -- this morning it started, it has continued through the afternoon -- the prolific kind of litigation that would be suggested by all of these procedures of different kinds that would validate the clause with many, many exceptions. There is a lack of realism in what we are talking about. Most of the litigation that arises in this field ends in settlements. Frequently they are settlements brought about by a kind of fairly respectable something approaching blackmail. (Laughter) By reason of having all of these procedures, you give the freebooters all the opportunities to harass those who would take under the will. I recognize that there are some situations where, as a matter of humanity, a matter of decency, I would like to see a gift thrown out. But when one looks over the whole field and sees the policy involved in this kind of litigation, I think it is one that is replete with useless, mean, and piggish litigation. I would strongly urge that we take a position as close to a strict rule as we can. I will express my bias further: I like the New York rule.

If the Commission should agree with Judge Breitel that the New York statute is preferable to the Uniform Probate Code section, it is still possible for the Commission to recommend a middle position. One of the ancient traditions of equity is to relieve against forfeiture in meritorious cases. A New York type statute could provide that a beneficiary who has unsuccessfully contested a will and has forfeited the benefits provided under the will, could be relieved of forfeiture upon proof that the contestant acted in good faith and with probable cause (or a substantial likelihood of success). Mr. Selvin in his

well-known article[13] has referred to § 3369 of the Civil Code[14] and the opinion of Justice Roger Traynor in Freedman v. The Rector[15].

If a statute gave this discretionary remedy after a forfeiture, there would be several advantages over a preliminary hearing to determine probable cause.

1. The court could consider facts developed during the contest and would not be limited to the facts known at the time the will was filed.

2. The burden of proof would be on the petitioner.

3. The cost of the proceeding would be the responsibility of the petitioner.

4. The standard of probable cause could be determined in the sound discretion of the court sitting without a jury.

There is no precedent for this suggestion except by analogy to equitable relief from forfeiture in other branches of the law.

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[13]Selvin, Terror in Probate, 16 Stan.L.Rev. 355 (1964).

[14]The section reads: "Neither specific nor preventative relief can be granted to enforce a penalty or forfeiture in any case ..."

[15]37 Cal. 2d 16, 230 P.2d 629 (1952).

APPENDIX I

American Law of Property

§ 27.4. Policy Considerations. No satisfactory solution to the problem of the legality of no-contest conditions can be expected until the courts are persuaded that they need not, indeed should not, decide that every such condition is either legal or illegal, whatever the circumstances in which it is imposed. Any approach to this problem should be postulated on the proposition that such a condition may be legal in one case and illegal in another, depending primarily on what grounds for contest are asserted in the particular case. Certain allegations against the validity of a will present policy considerations which are absent when the will or a part thereof is attacked on other grounds.

Although this problem was considered in English cases over two hundred years ago,[1] it is of comparatively recent origin in this country, the body of authority here is not yet large, and the leading cases, for the most part, have been cases of first impression. Under such circumstances, it was not unnatural for a court to regard the case before it as representative and to make broad statements about legality on the basis of that case alone. The result is that cases, distinguishable on their facts, have been made to stand for opposing propositions, and the position of those relying on past decisions and their sweeping dicta is less secure than a superficial analysis of the problem would indicate. It is one of the purposes in the succeeding sections to point out the errors of an overgeneralized ap-

[47] Williams v. Williams, 93 Tenn. 438 (1885).

[48] 92 Conn. 168, 101 Atl. 961 (1917).

[49] In the following cases the question of breach of condition apparently was raised by executors, but without express consideration of their right to do so: Donegan v. Wade, 70 Ala. 501 (1881); Bradford v. Bradford, 19 Ohio St. 546 (1869); Thompson v. Gaut, 82 Tenn. 310 (1884); *In re* Will of Keenan, 188 Wis. 163, 205 N.W. 1001 (1925); *cf.* Clark v. Tibbetts, 167 F.(2d) 397 (C. C.A. 2d, 1948).

§ 27.4. [1] Morris v. Burroughs, 1 Atk. 399 (Ch. 1737), cited *supra* § 27.2, note 37; Powell v. Morgan, 2 Vern. 90 (Ch. 1688), cited *supra* § 27.2, notes 35 and 37.

proach to this problem and to suggest some limitations on the use of past decisions as bases for the prediction of the result in future cases.

Before proceeding to an analysis of the cases in the light of the thesis asserted above, it is necessary to consider on principle what public policy requires in this matter. Opposing policies will always be urged upon a court, and conflicts between courts in weighing them may be expected, even where it is conceded that neither is invariably dominant. What balance must be struck if the public interest is to be best served?

That there is no policy one way or the other, as held in a leading English case,[2] would be generally denied in this country. That it is consistent with public policy to discourage vexatious and frivolous litigation, family quarrels, and the wasting of a testator's estate or the defaming of his reputation in protracted litigation over his will may be conceded. Such, in brief, are the bases for the rule, accepted by some courts, that no-contest conditions are valid generally. This, however, is but one side of the shield. On the other side are those safeguards, existing in every jurisdiction, to the expression and effectuation of a testator's will, which require that certain formal requirements be complied with by competent testators free from imposition by others. Probate courts generally consider it their duty to see that these safeguards are respected, a duty which, properly regarded, transcends the interests of a testator and his heirs, and which is discharged in the public interest. Courts cannot discharge this duty effectively, however, except on the initiative of others, specifically those who know the facts and are interested in the outcome. In the face of a condition against contest, such persons are able to furnish facts which they regard as pertinent to the validity of the will only on pain of forfeiting any interests thereunder if it is later held that such facts fall short of defeating the will. In this view a no-contest condition may be thought of as an instrument for nullifying the safeguards which have been built around the testamentary disposition of property. The condition is most vicious when used by or at the behest of one guilty of forgery, fraud, or undue influence. Even if it is not used for such a purpose, this usually cannot be known in advance of a judicial inquiry. In any event, there is a comparable public interest in preventing the probate of invalid wills,

[2] Cooke v. Turner, 15 M. & W. 727 (Ex. 1846).

innocently made, and an effective deterrent to inquiry is cause for concern in either case.

Obviously, no question of forfeiture can arise until a beneficiary has made his contest and has failed. He may appear in a bad light when he later claims under the will he sought to overthrow. He is under no duty to contest, except perhaps when he has knowledge or possession of an instrument which purports to be a later will, and should he not, therefore, take the consequences of a choice he is free to make? Is not the public interest sufficiently protected when, on proof of invalidity, a will is denied probate? It is believed not. No one can be certain of the strength of his own or his opponent's case, especially when factual issues predominate. This is not, of course, merely a matter of taking care of some poor fellow who thought he had a good case. The risks of litigation are a deterrent in any case. To increase them by permitting a threat of forfeiture of a contestant's interest under the will may be to suppress facts which it is in the public interest to have brought to light. So long as no-contest conditions appear sporadically, the extent of their effect in restraining contests which otherwise might be prosecuted successfully is only speculative. But before one espouses the rule sustaining this condition generally, he would do well to ponder the effect of such a rule if, under its nurture, the condition came to be a standard clause of general use.

This is no warrant, however, for proclaiming that no-contest conditions are illegal in all cases. The inveterate troublemaker, who all too often will emerge with petty and frivolous contentions to incite family animosities and waste his benefactor's estate so long as he incurs no special risk of loss, remains to be dealt with. Against him may not a no-contest condition be lawfully imposed? And may not this be done consistently with the policy of protecting those safeguards to the proper execution of wills? A desire to reconcile these ostensibly opposing policies has led some courts to enforce the condition except against one whose contest is based on probable cause. Whenever a will is contested on any of the usual grounds—namely, fraud, undue influence, forgery, testamentary incapacity, improper execution, or subsequent revocation—this probable-cause rule, it is submitted, best serves the public interest.

The American Law Institute has accepted the probable-cause rule only in cases where contest is made on the ground of fraud or subsequent revocation by later will or codicil; but

where contest is made on any other ground, the condition is valid and enforceable without regard to probable cause.[3] The policy of discouraging this type of litigation and its attendant evils is thought to outweigh opposing policy considerations in cases of the latter category, since, it is said, the probating of an instrument which is not the will of the testator is a situation of the "utmost rarity."[4] Justification for applying the probable-cause rule to the forgery and subsequent revocation cases is said to rest on the public interest in the discovery of the crime of forgery and the duty of presenting for probate any instrument in one's possession believed to be the last will of the testator. A claim of forgery or subsequent revocation by later will or codicil, moreover, is usually based, it is said, on evidence much more definite in character than that likely to be encountered in cases of the other types, and is less likely to be employed as a means of coercing a settlement from other beneficiaries.

The recognition by the American Law Institute of the importance of the grounds for contest in any determination of the legality of no-contest conditions will be received with relief and gratitude by anyone familiar with the unwitting obfuscations contained in many of the court opinions. The writer, however, cannot agree with the Institute's substantial rejection of the probable-cause rule. Although it may be a crime to forge a will, but not to coerce or defraud a testator into making one, and although there may be a duty to produce for probate anything believed to be a true will, but no duty to contest a testator's sanity, it does not follow that there is less public interest in preventing probate of a fraudulent will than a forged one, or an insane man's will than one which he has revoked by a later will. As Judge Miller put it in his dissent in *Barry* v. *American Security and Trust Company*,[5] "What real difference does it make whether a man cleverly imitates the signature of a testator or stands over him with a club and compels him to sign." If proof of forgery turns on evidence of a more definite kind than proof of fraud or undue influence, so does proof of improper execution. In a sense, the more definite proof available to sustain a contest on certain grounds is an argument for, not against, the enforcement of no-contest conditions in such cases, for the more definite the proof, the more readily can a contestant evaluate the merit of his case,

[3] Restatement, Property (1944) § 428.
[4] *Id.* Intro. Note c. 33.
[5] 135 F.(2d) 470, 475, 146 A.L.R. 1204, 1210 (App. D.C. 1943).

and the less does he need, in the public interest, to be relieved from the threat of forfeiture. If contests on grounds of fraud, undue influence, or incapacity rarely succeed, is this a reason for increasing or for decreasing the risks involved in contesting? Reference is again made to Judge Miller's dissent in the Barry case, where he urges that the "litigious troublemaker," fully equipped with counsel and funds sufficient to risk a contest, is the one least likely to be deterred by a threat of forfeiture; but those who will be restrained are the poor, the timid, the children, women, and incompetents, whose right to litigate public policy should be most concerned to protect.[6]

Recognizing that the need for shifts in emphasis from case to case makes impossible the formulation of an infallible rule of general applicability, it is believed that the evils of unjustified litigation in this field can be adequately restrained by a rigorous administration of the probable-cause requirement, and, therefore, that the best balance of policy factors is achieved in the acceptance of the probable-cause rule in all cases where contests are based on any of the usual grounds mentioned above. This may also supply the need for flexibility in the solution of the problem. Without attempting to state any definite standards of probable cause at this point, it is suggested that a court might even be justified in announcing that all doubts in this matter would be resolved against the contestant.[7] It is interesting to discover that in several leading cases the courts, although impelled to rule that no-contest conditions were valid generally, also found that the contesting beneficiaries had acted without probable cause.[8]

The validity of wills may be contested on grounds other than those indicated above, although no such cases have been found in which the legality of no-contest conditions was involved. It would seem that the reasons indicated for acceptance of the probable-cause rule apply to a contest on the ground of any sort of subsequent revocation, and should not be limited to revocation by later will or codicil. The same result seems indicated where it is charged that the instrument in question, although in proper testamentary form, was not intended as a

[6] *Id.* at 473, 146 A.L.R. at 1209.

[7] See *In re* Friend's Estate, 209 Pa. 442, 448, 58 Atl. 853, 855 (1904).

[8] Barry v. American Security & Trust Co., 135 F.(2d) 470, 146 A.L.R. 1204 (App. D.C. 1943); *In re* Miller's Estate, 156 Cal. 119, 103 Pac. 842 (1909) (two grounds alleged, one without probable cause); Rudd v. Searles, 262 Mass. 490, 160 N.E. 882, 58 A.L.R. 1548 (1928); Cross v. French, 118 N.J. Eq. 85, 177 Atl. 456 (Ch. 1935).

will, or that it was intended as a sham or joke.[9] No reason is seen for applying a different rule where it is alleged that a will was executed by mistake of a kind which will vitiate the whole will, as where, by mistake, a testator signs the wrong document.[10]

Suppose an attack is made on a particular provision, rather than on the will as a whole. Here also the validity of the condition should turn on the nature of the grounds for contest. It seems that specific provisions may be attacked on grounds of fraud, undue influence, or mistake, on proof of which the affected parts may be deleted if no violence is done to the testator's scheme of disposition by giving effect to the remaining provisions.[11] Although as yet there has not been any adjudication of the validity of no-contest conditions in such cases, the same reasons for denying forfeiture when there is probable cause for contest obtain here as where the will as a whole is attacked on such grounds. The same result should be reached when the contest is successful and the remainder of the will is allowed to stand.[12]

If a provision of a will is attacked on the ground that it violates some express social restriction on the disposition of property, such as the Rule against Perpetuities or kindred rule, the rules against restraints on alienation, accumulations, restraints on marriage, or other provisions designed to influence conduct illegally, or a mortmain statute limiting dispositions to charitable purposes, it does not seem possible that a no-contest condition would be enforced by any court against a contestant who succeeded in such a suit.[13] To enforce the condition would amount to penalizing the contestant for proving that the testator had violated the law. Adequate protection of these social policies would seem to require the same result where the contest fails, provided the contestant acted on probable cause.[14] Here the issues are not predomi-

[9] See Atkinson, Wills (1937) §§ 66, 191, 192, for discussion of circumstances under which these types of contest may be entertained.

[10] Certain types of mistake, such as mistake in the inducement, are usually regarded as insufficient to defeat the will. *Id.* § 106. In such cases, it would seem that forfeiture should be enforced without regard to probable cause.

[11] *Id.* § 112.

[12] Certain types of mistake, such as mistake in the legal effect of the language used, are usually not regarded as sufficient to defeat the will or a part thereof. Atkinson, Wills (1937) § 105. In such cases, it would seem that forfeiture should be decreed without regard to probable cause, provided it is found that the beneficiary's action amounts to a violation of the no-contest condition.

[13] *Accord*, Restatement, Property (1944) § 429(2).

[14] *Ibid.*

nately factual, but turn on the application of intricate legal rules or variable social policies, where there is little justification for making a beneficiary bear the risk of correctly anticipating the ultimate ruling.

Sometimes a beneficiary will allege ownership of property which the testator has attempted to leave to others. Here no policy is perceived which should prevent a testator from putting a beneficiary to an election between taking under the will or asserting ownership of the property given to others, however hard or unfair the choice may be. No one but the parties affected thereby can properly be concerned about such a disposition, so long as the owner is free to enforce his claim. It may be hard on a beneficiary if, after failing to establish his ownership of the property devised, he must forfeit any other interest given by the will as well, but in this consequence alone the public has no special interest. That he may have had ample reason for asserting his claim of ownership, indeed that he may in fact have established it, seems irrelevant to the legality of the condition. In these cases, therefore, the condition should be enforced without regard to probable cause.[15]

The validity of particular provisions of wills may be attacked on other grounds. No attempt is made herein to survey the possibilities. Many of such grounds will bear no relation to any public policy which would prevent the enforcement of applicable no-contest conditions. It may be that other grounds for contest than those mentioned herein will appear which require, for the protection of some public interest, the nullification of the condition. It is hoped that the legality of the conditions in such cases will not be determined on the basis of broad pronouncements in other cases which have been inspired by factual situations wholly different from those in issue.

In conclusion, it is urged that the rule sustaining the legality of no-contest conditions generally be rejected. There is still less reason for a rule that they are illegal in all cases. In

[15] A somewhat similar problem may arise in those jurisdictions which have abolished common-law dower and curtesy and have, by statute, imposed limitations on the amount of property which a testator may bequeath to others than his spouse. The considerable diversity among the various statutes and the lack of any authority on the question prevents the formulation of any general rules governing the effect that a no-contest condition can have on a spouse's rights under such a statute. See Restatement, Property (1944) Intro. Note c. 33.

some cases they may be valid and enforceable simply on proof of breach thereof; in others they should be enforced only on a further finding that contest was made without probable cause. The category into which the particular case falls should depend on whether the contestant has alleged that either the will or a part thereof violates some specific statute, policy, or rule of law regulating or restricting the testamentary disposition of property. This recommendation is not intended to be dogmatic nor the application of the recommended rule inflexible. It is recognized that special, unusual, and perhaps unforeseeable circumstances may prevent an invariable application of any general rule.