WILL CONTESTS IN TEXAS: DID THE CODIFICATION OF THE GOOD FAITH AND PROBABLE CAUSE EXCEPTION RENDER *IN TERROREM* CLAUSES MEANINGLESS?

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I. INTRODUCTION

In terrorem clauses, also known as no-contest clauses, have long been used in wills and trusts to help preserve and protect testamentary dispositions of property. When interpreting and applying *in terrorem* clauses in wills and trusts, Texas courts have used various approaches, and Texas case law dealing with *in terrorem* clauses has in no way been uniform.[1] In 2009, the Texas Legislature took on the task of weighing the various interests affected by the enforcement of *in terrorem* clauses located in wills and trusts and attempted to provide a comprehensive balance among Texas's competing public policies.[2] The Texas Legislature passed H.B. 1969 with the ambitious intent of "clarify[ing] existing law"[3] in this area by enacting statutes that are applicable to both wills and trusts.[4] In

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[1] *See infra* Part III.B.

[2] *See* House Comm. on Judiciary & Civil Jurisprudence, Bill Analysis, Tex. H.B. 1969, 81st Leg., R.S. (2009) (explaining that H.B. 1969 "amends the Texas Probate Code. . . . [and Texas] Property Code to provide that a provision in a will that purports to penalize an interested person for contesting the will is unenforceable if probable cause exists for commencing the contest and the contest was brought in good faith.").

[3] *See infra* note 101.

[4] TEX. PROB. CODE ANN. § 64 (West, Westlaw through 2011 Sess.); TEX. PROP. CODE ANN. §§ 111.0035(b)(6), 112.038 (West, Westlaw through 2011 Sess.). The Acts of 2009, 81st Leg., ch. 680 redesignates and repeals the Texas Probate Code and enacts the Estates Code effective January 1, 2014. There are no substantive changes to the forfeiture provisions, and for purposes of this article, the Texas Probate Code and Texas Property Code will be referred to as the statutes

sum, these statutes provide that an *in terrorem* clause is unenforceable as to a beneficiary who contests a will or trust in good faith and upon probable cause.[5] Most recently, the 82nd Legislature tweaked these statutes by replacing "probable cause" with "just cause."[6] The legislature has indicated that this change is "nonsubstantive."[7] Because the language in H.B. 1969 is entirely new to Texas precedent interpreting will contests, this article will analyze the language as it existed before the amendments and assume that the analyses will apply equally to the "just cause" language.

As this article will reveal, the legislature's failure to elaborate on the limited language used to codify this exception leaves several questions open to interpretation by Texas courts.[8] Other than making it clear that Texas now recognizes a form of the "good faith and probable cause" exception, the statutes do little to "clarify" this previously murky area of Texas law.[9] While Texas courts have yet to construe this new legislation, this article will identify the different possible interpretations of these statutes,[10] discuss the potential impact of these statutes on testators, settlors, and beneficiaries in Texas, and then briefly address what, if any, impact the 2011 amendments have upon the application of this legislation.[11]

II. BACKGROUND

A. Brief History of In Terrorem *Clauses*

An *in terrorem* clause is a provision in a donative document that purports to retract a donative transfer to any person who initiates a proceeding challenging the validity of all or a part of the donative document.[12] The following is an example of an *in terrorem* clause:

> In the event that any provision of this my last will and testament is contested by any of the parties mentioned

codifying the good faith and probable cause exception.

[5] TEX. PROB. CODE ANN. § 64; TEX. PROP. CODE ANN. § 112.038.

[6] Tex. S.B. 1197, 82d Leg., R.S. (2011) (engrossed); Tex. S.B. 1198, 82d Leg., R.S. (2011) (engrossed).

[7] *See infra* note 189.

[8] *See infra* Part V.

[9] *See infra* Part V.B.

[10] TEX. PROB. CODE ANN. § 64; TEX. PROP. CODE ANN. § 112.038.

[11] *See infra* Part VI.

[12] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.5 (2003).

> herein, the portion or portions of the estate to which such party or parties would be entitled shall be disposed of in the same manner as though their name or names had not been mentioned herein.[13]

Testators and settlors use *in terrorem* clauses in wills and trusts primarily to preserve their donative intent and to prevent dissatisfied beneficiaries from contesting the document to coerce a more favorable settlement.[14] An *in terrorem* clause will usually provide that a beneficiary may take from the will or trust exactly as the testator or settlor provided in the document, and if the beneficiary chooses to contest the will or trust, he or she forfeits any interest in the property and will take nothing.[15] Due to the public policy against forfeitures, courts strictly construe the language of an *in terrorem* clause to avoid extending the transferor's intent beyond the plain language of the document.[16] A breach of an *in terrorem* provision will only be found when the beneficiary's actions fall strictly within the scope of the express terms of the *in terrorem* clause.[17]

Traditionally, the general rule has been to recognize and enforce *in terrorem* clauses that penalize beneficiaries who contest a will.[18] As early as 1845, the English High Court of Chancery held that a no-contest clause providing a gift over upon a will contest was valid.[19] In 1898, the United States Supreme Court agreed that the rationale for enforcing *in terrorem* clauses was consistent with "good law and good morals."[20] *In terrorem* clauses are useful tools to ensure that a deceased testator's intent is not

[13] Barry v. Am. Sec. & Trust Co., 135 F.2d 470, 471 (D.C. Cir. 1943).

[14] *See* Soefje v. Jones, 270 S.W.3d 617, 631 (Tex. App.—San Antonio 2008, no pet.).

[15] Jack Leavitt, *Scope and Effectiveness of No-Contest Clauses in Last Wills and Testaments*, 15 HASTINGS L.J. 45, 45 (1963).

[16] *See* GERRY W. BEYER, TEXAS PRACTICE SERIES: TEXAS LAW OF WILLS § 52.9 (3d ed. 2002).

[17] Leavitt, *supra* note 15, at 46.

[18] *See supra* note 15.

[19] Cooke v. Turner, 60 Eng. Rep. 449, 452 (1845) ("There appears to be no more reason why a person may not be restrained by a condition from disputing sanity, than from disputing any other doubtful question . . . on which the title to a devise or grant may depend."). To prove a testator intended an *in terrorem* clause to be enforced, English Law required a testator to provide a gift over upon the breach of the condition in the clause, because otherwise, the court presumed the clause was merely "intended only to frighten the beneficiary to comply." Martin D. Begleiter, *Anti-Contest Clauses: When You Care Enough to Send the Final Threat*, 26 ARIZ. ST. L.J. 629, 649 (1994).

[20] Smithsonian Inst. v. Meech, 169 U.S. 398, 415 (1898).

interfered with when the testator no longer has the opportunity to speak for himself and defend his intentions.[21] Such clauses seek to minimize the selfish bickering that arises once the transferor has died, protect estates from costly and time-consuming litigation, and prevent dissatisfied beneficiaries from trying to coerce a more favorable settlement.[22] However, these goals must be balanced with the public policy interest of allowing beneficiaries to access the courts and prevent the probate of wills that were legitimately procured by some type of wrongdoing on the part of the transferor or a third party.[23] Wills are most commonly contested based on one of six grounds: lack of testamentary capacity, fraud, undue influence, improper execution, forgery, or subsequent revocation by a later will.[24] Thus, when an *in terrorem* provision is held valid and enforceable, one who has fraudulently or through undue influence created a will or trust will be unjustly enriched and remain free from liability.[25] The only people with an incentive to challenge this unjust enrichment are usually deterred by the threat of losing their respective share of the will or trust, which ultimately absolves the wrongdoer of any punishment.[26]

Jurisdictions have developed different methods for balancing these competing interests.[27] Some jurisdictions view a general condition against contests as absolutely valid, while many others recognize an exception to the operability of *in terrorem* provisions when the contest is raised in good faith or with probable cause.[28] Several states have statutorily acknowledged some form of this exception, including Texas's most recent updates to the

[21] *See id.* at 402–03.

[22] *See* Russell v. Wachovia Bank, N.A., 633 S.E.2d 722, 725–26 (S.C. 2006).

[23] *See infra* notes 25 and 26 (discussing the potential for a wrongful action to be left uncorrected if *in terrorem* provisions are strictly enforced).

[24] Alper v. Alper, 65 A.2d 737, 740 (N.J. 1949).

[25] BEYER, *supra* note 16, § 52.9 ("If an *in terrorem* provision is effective, a powerful tool is placed in the hands of a person who fraudulently or through undue influence procures the execution of a will. The clause may give the evildoer a greater chance of success by terrorizing potential contestants who are given substantial benefits under the will.").

[26] Leavitt, *supra* note 15, at 62–63 (noting that the enforcement of wills is left to private citizens—the decedent's heirs or beneficiaries). "Either [the beneficiaries] call a 'technical' violation to the court's attention or the violation will probably pass unnoticed." *Id.*

[27] *See infra* Part III.A.

[28] *See, e.g.*, Colo. Nat'l Bank v. McCabe, 353 P.2d 385, 392 (Colo. 1960) (en banc); S. Norwalk Trust Co. v. St. John, 101 A. 961, 963 (Conn. 1917); *In re* Estate of Pellicer, 118 So. 2d 59, 61 (Fla. Dist. Ct. App. 1960); Geisinger v. Geisinger, 41 N.W.2d 86, 93 (Iowa 1950); *In re* Estate of Campbell, 876 P.2d 212, 216 (Kan. Ct. App. 1994).

Texas Probate and Property Codes.[29] Additionally, many courts have found reasons to strike down certain no contest-clauses by relying on the rule of strict construction.[30] Courts may either avoid interpreting the provision altogether by deciding that the operation of the clause would create a condition which violates public policy or by finding the beneficiary's particular actions do not amount to a "contest" of the document.[31]

III. HISTORICAL TREATMENT OF *IN TERROREM* CLAUSES

A. The Legal Treatment of In Terrorem *Clauses Varies from Jurisdiction to Jurisdiction*

Four major approaches to evaluating *in terrorem* clauses have emerged amongst the various jurisdictions.[32] In general, courts will find an *in terrorem* clause to be: (1) void as a matter of public policy, (2) absolutely valid, (3) invalid because of certain provisions, or (4) valid except if the contest was brought in good faith or upon probable cause.[33] Only a small minority of jurisdictions refuse to recognize the validity of *in terrorem* clauses across the board in all cases.[34] Most courts recognize that no-contest clauses are valid as a general rule, but many have implemented exceptions to the enforceability of such clauses—either statutorily or by borrowing persuasive arguments from other jurisdictions.[35]

The view that *in terrorem* clauses are absolutely valid rests heavily upon the concepts of testamentary freedom and upholding the transferor's intent.[36] Proponents of *in terrorem* clauses argue that a good faith and probable cause exception to the validity of *in terrorem* clauses defeats the

[29] TEX. PROB. CODE ANN. § 64 (West, Westlaw through 2011 Sess.); TEX. PROP. CODE ANN. § 112.038 (West, Westlaw through 2011 Sess.).

[30] *See* BEYER, *supra* note 16, § 52.9.

[31] *See infra* Part III.A.

[32] Leavitt, *supra* note 15, at 54.

[33] *Id.*

[34] *See, e.g.*, FLA. STAT. ANN. § 732.517 (West 2010) ("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."); IND. CODE ANN. § 29-1-6-2 (West 2010) (stating that a no-contest clause threatening forfeiture is statutorily void).

[35] *See* Leavitt, *supra* note 15, at 47.

[36] Begleiter, *supra* note 19, at 632 (noting that courts should follow the will's directions when "[t]he clause is clearly stated in the testator's will").

expressed purpose of the testator.[37] First, the function of the court in construing a will or trust is to ascertain the transferor's intent, and, if lawful, to give full effect and deference to this expressed intent.[38] Testators and settlors may dispose of their property through a will or trust without regard to equity, and courts must execute the lawful intent of the transferor notwithstanding an "unwise or capricious" division of the property.[39] Furthermore, testamentary freedom is considered one of the "cornerstone[s] of Anglo-American law of succession."[40] American courts, as opposed to courts in civil law countries, do not require forced heirship.[41] This leaves testators and settlors with the liberty to disinherit descendants and dispose of property in any manner desired, attaching whatever bells and whistles to the gratuitous transfer as the testator or settlor chooses.[42] Courts that recognize the absolute validity of *in terrorem* clauses view conditions proscribing contests of wills or trusts as just one of the many conditions transferors have the right to attach to donative transfers of property.

Even those jurisdictions that recognize the validity of *in terrorem* clauses may choose to strike down a clause by finding its particular provisions to be invalid. As a general rule, transferors may impose conditions on the disposition of their property as they please, as long as the conditions are sufficiently definite, and are not impossible or illegal.[43] Conditions against contesting a will are generally held to be valid, at least if

[37] *Id.* at 633.

[38] *In re* Moorehouse's Estate, 148 P.2d 385, 388 (Cal. Dist. Ct. App. 1944); Calvery v. Calvery, 55 S.W.2d 527, 529 (1932) (noting that the "primary maxim of construction" in wills is to "ascertain the intention of the testator").

[39] *Moorehouse*, 148 P.2d at 388 (A testator may dispose of property "without regard to moral or natural claims upon his bounty" and is not "bound to bequeath it in such a manner as to gain the approbation of his contemporaries, the wise or the good."); *In re* Houston's Estate, 89 A.2d 525, 526 (Pa. 1952) ("[T]he law does not require that the distribution provided by will be wise or even equitable provided the testator has clearly expressed his intention.").

[40] J. Andrew Heaton, Comment, *The Intestate Claims of Heirs Excluded by Will: Should "Negative Wills" Be Enforced?*, 52 U. CHI. L. REV. 177, 183 (1985).

[41] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.5 reporter's note 1(1) (2003) (noting that children and spouses in civil law countries have "a forced share entitlement in the estate of a parent").

[42] *In re* Andrus' Will, 281 N.Y.S. 831, 845 (1935) ("[A] testator has the right to attach to a bequest or devise made by him any condition 'whether sensible or futile,' provided only that it is not illegal, nor opposed to public policy."); Begleiter, *supra* note 19, at 634 ("The no-contest clause is employed to effectuate the testator's intent and, as long as not contrary to public policy, it should be enforced.").

[43] *See Andrus' Will*, 281 N.Y.S. at 845.

there is a gift over in case one beneficiary violates the no-contest clause.[44] However, courts narrowly construe *in terrorem* clauses, which leaves little room for error on the part of the drafter.[45] Courts may refuse to enforce clauses that are poorly worded, too indefinite, or place limitations on a beneficiary's conduct that are too broad.[46] In addition, courts often invalidate *in terrorem* clauses when the enforcement of the clause generates consequences that are inconsistent with a state's constitution and laws.[47] For example, a New York case analyzed a clause that required the testamentary beneficiaries to acquiesce in and to ratify the administration of certain trusts without question, and these trusts were to be carried over into the testator's will by reference.[48] The trust immunized all actions taken by the trustees, except for actions taken in bad faith or with gross negligence.[49] However, the *in terrorem* clause in the will prevented beneficiaries from even questioning the trustees' actions to determine whether there was bad faith or gross negligence.[50] The scope of the clause was so broad and comprehensive that that it absolved the trustees from all responsibility for their actions, regardless of the legality of their conduct.[51] The New York court held this clause to be void because it was inconsistent with the laws and public policies of New York, which encourage courts to supervise trust administration.[52]

The Uniform Probate Code (UPC), the Restatement (Third) of Property, and an abundant number of states have recognized some form of a good faith or probable cause exception to the validity of *in terrorem* clauses.[53] The UPC's *in terrorem* clause provision provides that, "[a] provision in a will purporting to penalize any interested person for contesting the will or

[44] Begleiter, *supra* note 19, at 649. The concept that an *in terrorem* clause is only valid with respect to transfers of personal property if a gift over is provided derived from the English ecclesiastical courts and remains visible in some American jurisdictions. *Id.* Over the last fifty years, nearly all courts have rejected this concept. *Id.* at 649–50.

[45] Leavitt, *supra* note 15, at 46, 55.

[46] *Id.* at 55. *See Andrus' Will*, 281 N.Y.S. at 859, 861.

[47] *See* Leavitt, *supra* note 15, at 56.

[48] *Andrus' Will*, 281 N.Y.S. at 851.

[49] *Id.* at 853.

[50] *Id.*

[51] *Id.* at 852.

[52] Leavitt, *supra* note 15, at 56. *See Andrus' Will*, 281 N.Y.S. at 861.

[53] *See* UNIF. PROBATE CODE § 3-905 (amended 2010), 8 U.L.A. 272 (1998); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.5 (2003). *See also infra* notes 55, 57.

instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings."[54] Fifteen states have enacted a statute based on the language in the UPC's provision.[55] The Restatement (Third) of Property also supports the view that a no-contest clause is valid and enforceable unless the challenge is based on probable cause.[56] Several other states, including California and New York, have enacted statutes with their own variations of the UPC's exception.[57] For example, California's statute regarding *in terrorem* clauses requires probable cause but limits the grounds upon which a beneficiary may contest the document without violating the clause.[58]

B. Texas's Treatment of In Terrorem *Clauses*

Before the passage of H.B. 1969, Texas law relating to *in terrorem* provisions remained unsettled due to the lack of a guiding statute or a Texas Supreme Court case directly on point.[59] While the earliest Texas cases upheld *in terrorem* provisions without regard to the contestant's motives, several lower courts later recognized an exception to forfeiture if the contestant demonstrated that the contest was brought in good faith and upon

[54] UNIF. PROBATE CODE § 3-905 (amended 2010), 8 U.L.A. 272 (1998).

[55] ALASKA STAT. § 13.16.555 (2010); COLO. REV. STAT. ANN § 15-12-905 (West 2005); HAW. REV. STAT. § 560:3-905 (2010); IDAHO CODE ANN. § 15-3-905 (West 2009); ME. REV. STAT. ANN. tit. 18-A, § 3-905 (1998); MICH. COMP. LAWS ANN. § 700.3905 (LexisNexis 2005); MINN. STAT. ANN. § 524.2-517 (West 2002); MONT. CODE ANN. § 72-2-537 (2010); NEB. REV. STAT. § 30-24, 103 (2008); N.J. STAT. ANN. § 3B:3-47 (West 2007); N.M. STAT. ANN. § 45-2-517 (West 2003); N.D. CENT. CODE § 30.1-20-05 (2010); S.C. CODE ANN. § 62-3-905 (2009); S.D. CODIFIED LAWS § 29A-3-905 (2004); UTAH CODE ANN. § 75-3-905 (LexisNexis 1993).

[56] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.5 cmt. a (2003).

[57] *See* CAL. PROB. CODE § 21311 (West 2011); FLA. STAT. ANN. § 732.517 (West 2010); GA. CODE ANN. § 53-4-68 (West 2003); IND. CODE ANN. § 29-1-6-2 (West 2010); MD. CODE ANN., EST. & TRUSTS § 4-413 (LexisNexis 2001); N.Y. EST. POWERS & TRUSTS LAW § 3-3.5 (Consol. 2006).

[58] CAL. PROB. CODE § 21311 ("A no contest clause shall only be enforced against the following types of contests: (1) A direct contest that is brought without probable cause[,] (2) [a] pleading to challenge a transfer of property on the grounds that it was not the transferor's property at the time of the transfer . . . [,] (3) [t]he filing of a creditor's claim or prosecution of an action based on it . . . .").

[59] *See* House Comm. on Judiciary & Civil Jurisprudence, Bill Analysis, Tex. H.B. 1969, 81st Leg., R.S. (2009).

probable cause. [60] Still, other courts, including the Texas Supreme Court, hedged the precise issue of whether to recognize a good faith and probable cause exception by determining the enforceability of an *in terrorem* clause on other grounds.[61]

Originally, Texas courts enforced *in terrorem* provisions without regard to the reason for the contest.[62] The early string of cases reflects Texas's strong recognition of the well-established public policy of permitting testamentary freedom.[63] In *Perry v. Rogers*, the court enforced the *in terrorem* provision in question even though the effect was to deprive innocent devisees of their benefit upon "any attack" of the will because the court found the testator's intent to be plain and unambiguous.[64] The court emphasized the need to carry out the testator's intention so long as it did not violate laws or run inconsistent with public policy.[65] To illustrate the court's respect for testators' autonomy, the court allowed the document to speak for itself and noted that even if "it affirmatively appeared from the record that the will . . . was unreasonable and unjust, the intention of the testator nevertheless being plain, [the court] would have no right to revise or remake the will."[66] *Massie v. Massie*, another early Texas case decided just one year after *Perry*, upheld the enforceability of a no-contest clause in a will, despite the defendant's arguments that the testator devised his property unjustly.[67]

It was not until the 1930s that Texas cases began to reflect the idea of a good faith or probable cause exception after it was mentioned with seeming approval by the Texas Supreme Court in *Calvery v. Calvery*.[68] In *Calvery*, the testatrix, Mrs. N.E. Calvery, left a will purporting to dispose of her

[60] Hodge v. Ellis, 268 S.W.2d 275, 287 (Tex. Civ. App.—Fort Worth 1954), *rev'd on other grounds*, 277 S.W.2d 900 (1955); First Methodist Episcopal Church S. v. Anderson, 110 S.W.2d 1177, 1184 (Tex. Civ. App.—Dallas 1937, writ dism'd). *See* House Comm. on Judiciary & Civil Jurisprudence, Bill Analysis, Tex. H.B. 1969, 81st Leg., R.S. (2009).

[61] Calvery v. Calvery, 55 S.W.2d 527, 530 (1932); House Comm. on Judiciary & Civil Jurisprudence, Bill Analysis, Tex. H.B. 1969, 81st Leg., R.S. (2009).

[62] Massie v. Massie, 118 S.W. 219, 219 (Tex. Civ. App.—Dallas 1909, no writ); Perry v. Rogers, 114 S.W. 897, 899 (Tex. Civ. App.—Texarkana 1908, no writ).

[63] *See Massie*, 118 S.W. at 219. *See also Perry*, 114 S.W. at 899.

[64] 114 S.W. at 899.

[65] *Id.*

[66] *Id.*

[67] 118 S.W. at 219.

[68] Calvery v. Calvery, 55 S.W.2d 527, 530 (1932).

entire estate by leaving to Mabel Calvery a life estate in a 200-acre tract of land and bequeathing the remainder to the "heirs of the body" of Mabel.[69] The testatrix also included an *in terrorem* clause which asserted that "any effort to vary the purpose and intention" of her expressed dispositions would revoke said beneficiary's bequests under the will.[70] After the will was probated and Mabel took possession of the 200-acre tract, she purported to convey the land in fee simple to Stovall, without making any reservation or remainder in the deed, and permitted him to encumber the property with a lien before he reconveyed the land back to her.[71] Mabel then filed suit seeking a construction of the will to ascertain whether she had acquired fee-simple title to the land under the terms of the will.[72] The defendants, the heirs of Mabel's body, argued that Mabel's actions violated the *in terrorem* provision in the will, thereby forfeiting her interest in the estate and entitling them to immediate possession of the 200-acre tract of land.[73] In dicta, the court mentioned that the "great weight of authority" supports the rule that a will contest made in good faith and upon probable cause shall not cause a forfeiture of rights under a will.[74] However, the court decided that a decision on this precise issue was unnecessary given the facts of the case before it.[75] The court held that no forfeiture resulted because Mabel's actions did not amount to a contest under the terms of the *in terrorem* provision in the will because she was not attempting to "vary the purpose or intention" of the testatrix.[76] The court viewed the terms of the will as giving Mabel a justified right to believe she was entitled to a fee-simple estate due to the ambiguous nature of the language "heirs of the body" when used in Texas and thus, the valid right to ascertain the true intent of the testatrix and to enforce that intent, not to change the will's purpose.[77] While the court did use the phrases, "probable cause" and "good

[69] *Id.* at 528.

[70] *Id.*

[71] *Id.*

[72] *Id.* at 530.

[73] *Id.* at 529.

[74] *Id.* at 530.

[75] *Id.*

[76] *See id.* (noting that Mabel sought a construction of the will to ascertain the testatrix's intent and not to destroy the will).

[77] *Id.* (refusing to agree that a suit "brought in good faith and upon probable cause, to ascertain the real purpose and intention of the testator and to then enforce such purpose and intention, should be considered as an effort to vary the purpose and intention of the will").

faith," in explaining its holding, the court clearly stated that it was leaving open the question as to whether a forfeiture would result from a suit merely to ascertain the intent of a testator or whether forfeiture would result from a suit instituted in good faith or when probable cause existed.[78] The fact that the court declined to answer whether Texas recognizes this exception after taking the time to mention it favorably seems to show the court's reluctance early on to place such a strong limitation on testamentary freedom.[79] While the court undoubtedly appreciated the public policy arguments for recognizing this exception, it "purposely refrain[ed] from a discussion" on devises of personal property and specifically limited its holding to real property and the facts of this case.[80]

Subsequent to the Texas Supreme Court's mention of the good faith and probable cause exception in *Calvery*, several lower courts cited to this exception and allowed contestants to provide evidence of their good faith and probable cause.[81] In *Hodge v. Ellis*, the court held that a suit brought in good faith and upon probable cause would not require a forfeiture of any benefits provided for the plaintiff in the will.[82] The court in *Sheffield v. Scott* allowed issues of the existence of good faith and probable cause for the appellants' will contest to be submitted to the jury, and the probate court entered a judgment according to the jury's findings.[83] While several courts continued to interpret no-contest clauses without regard to the exception, other courts identified the need for such an exception, foreshadowing the eventual codification of the good faith and probable cause exception in Texas.[84] As the court in *Gunter v. Pogue* concluded, "given the proper circumstances, Texas would and probably should adopt the good faith and probable cause exception."[85]

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[78] *Id.* at 530–31.

[79] *See id.*

[80] *See id.*

[81] Hodge v. Ellis, 268 S.W.2d 275, 287 (Tex. Civ. App.—Fort Worth 1954), *rev'd on other grounds*, 277 S.W.2d 900 (1955); First Methodist Episcopal Church S. v. Anderson, 110 S.W.2d 1177, 1184 (Tex. Civ. App.—Dallas 1937, writ dism'd); *see* Sheffield v. Scott, 662 S.W.2d 674, 676 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.).

[82] 268 S.W.2d at 287.

[83] 662 S.W.2d at 676.

[84] Hammer v. Powers, 819 S.W.2d 669, 673 (Tex. App.—Fort Worth 1991, no writ); Estate of Newbill, 781 S.W.2d 727, 729–30 (Tex. App.—Amarillo 1989, no writ); Gunter v. Pogue, 672 S.W.2d 840, 843 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.); *First Methodist*, 110 S.W.2d at 1184.

[85] 672 S.W.2d at 843; *see Calvery*, 55 S.W.2d at 530; *Newbill*, 781 S.W.2d at 729–30; *First*

IV. TEXAS LEGISLATURE PASSES H.B. 1969

A. Implications of the Newly Codified Exception

Representative Hartnett filed House Bill 1969 on February 27, 2009 proposing several amendments to Chapter IV of the Texas Probate Code and Chapter 112 of the Texas Property Code.[86] The Bill planned to codify the good faith and probable cause exception to the enforcement of *in terrorem* clauses found in wills and trusts.[87] House Bill 1969 was signed by the governor on June 19, 2009 and went into effect immediately.[88] As a result, Section 64 was added to the Texas Probate Code to provide that a provision in a will that purports to penalize an interested person for contesting the will is unenforceable if probable cause exists for commencing the contest and the contest was brought and maintained in good faith.[89] Additionally, the Bill added Section 112.038 to the Texas Property Code to provide for an identical exception in regard to *in terorrem* provisions in trusts.[90] Furthermore, the Bill amended Section 111.0035(b) of the Property Code to prevent the terms of a trust from waiving the applicability of the newly added Section 112.038 of the Property Code.[91] Both Section 64 of the Probate Code and Section 112.038 of the Property Code apply prospectively.[92] Whether this exception will be applied with respect to estates of testators or settlors who included *in terrorem*

Methodist, 110 S.W.2d at 1184.

[86] Gerry W. Beyer & Benjamin Major, *Are* In Terrorem *Clauses Still Frightening?*, ESTATE PLANNING DEVELOPMENTS FOR TEXAS PROFESSIONALS (Frost Bank, San Antonio, Tex.), July 2010, at 2.

[87] House Comm. on Judiciary & Jurisprudence, Bill Analysis, Tex. H.B. 1969, 81st Leg., R.S. (2009).

[88] Act of June 19, 2009, 81st Leg., R.S., ch. 414, § 5, 2009 Tex. Gen. Laws 995, 996; H.J. of Tex., 81st Leg., R.S. 6978–79 (2009).

[89] TEX. PROB. CODE ANN. § 64 (West Supp. 2010).

[90] TEX. PROP. CODE ANN. § 112.038 (West Supp. 2010).

[91] TEX. PROP. CODE ANN. §§ 111.0035(b)(6) (West 2007 & Supp. 2010).

[92] Section 64 applies only to the estate of a decedent who dies on or after June 19, 2009. TEX. PROB. CODE ANN. § 64 historical note (West Supp. 2010) [Act of June 19, 2009, 81st Leg., R.S., ch. 414, § 1, 2009 Tex. Gen. Laws 995, 995]. Section 112.038 applies only to a trust existing on or created on or after June 19, 2009. TEX. PROP. CODE ANN. § 112.038 historical note (West Supp. 2010) [Act of June 19, 2009, 81st Leg., R.S., ch. 414, § 3, 2009 Tex. Gen. Laws 995, 995–96].

provisions in their wills or trusts and who died before June 19, 2009 remains unclear.[93]

The legislative history for H.B. 1969 is extremely sparse.[94] In a nutshell, the legislature expressed its intent "to clarify existing law."[95] According to statements made by Representative Hartnett, these statutes were added to decrease "the chilling effect of *in terrorem* clauses on a beneficiary's willingness to challenge testamentary instruments that were created under suspicious circumstances."[96] Representative Hartnett also expressed concerns regarding the demographics in Texas.[97] Due to increased life expectancies, testators and settlors may be more vulnerable to undue influence.[98] Furthermore, Representative Hartnett recognized several cultural trends that have resulted in more complex testamentary dispositions of property, such as the increasing numbers of Texans dying without children, and the increasing breakup of nuclear families due to divorce and subsequent marriage.[99]

V. HOW WILL TEXAS COURTS APPLY THE EXCEPTION?

A. Questions Left Unanswered by the Original Statutes

In the first attempt to "clarify existing law" through the enactment of House Bill 1969, the Texas Legislature left several important questions open to judicial interpretation. When faced with the task of adding an *in terrorem* clause into a client's will or trust or when construing an existing *in terrorem* clause, Texas lawyers and judges will need to understand the impact of current forfeiture statutes.[100] Pursuant to the originally enacted versions, Texas lawyers and judges were left to resolve the following issues: (1) how to define "good faith" or "probable cause;" (2) who has the burden of proof to plead and prove the newly codified exception; (3) whether the legislature's amendment to the Texas Property Code which prevents Section 112.038 from being waived implies that the forfeiture

[93] *See* sources cited *supra* note 92. *See also* H.J. of Tex., 81st Leg., R.S. 6978–79 (2009).

[94] *See* H.J. of Tex., 81st Leg., R.S. 6978–79 (2009).

[95] Tex. H.B. 1969, 81st Leg., R.S. (2009) (enrolled).

[96] Beyer & Major, *supra* note 86, at 2.

[97] *See id.*

[98] *Id.*

[99] *Id.*

[100] TEX. PROB. CODE ANN. § 64 (West, Westlaw through 2011 Sess.).

clause provision in the Probate Code may be waived; and (4) what exactly the "brought and maintained" in good faith requirement means.[101]

B. What Constitutes "Good Faith" or "Probable Cause?"

The first step in analyzing the meaning of "good faith" and "probable cause" as used in the Texas statutes is to determine where the Texas Legislature found this language.[102] Potential sources include the Uniform Probate Code (UPC) or Uniform Trust Code, the Restatement (Third) of Property (Donative Transfers) (Restatement), or other state's statutes.[103] The UPC 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."[104] According to the Restatement, probable cause exists when, at the time of instituting the proceeding, there was evidence that would lead a reasonable person, properly informed and advised, to conclude that there was a substantial likelihood that the challenge would be successful.[105] "Probable cause" requires a reasonable, not merely a good faith belief that the will is invalid.[106]

As an established canon of construction, it can be assumed that the Texas Legislature knew of the language used in the UPC and in other state statutes that adopted the UPC's language.[107] Therefore, it is noteworthy to recognize the disparities between the Texas statute and other codifications

[101] Tex. H.B. 1969, 81st Leg., R.S. (2009) (enrolled); Beyer & Major, *supra* note 86, at 2.

[102] *See In re* Pirelli Tire, L.L.C., 247 S.W.3d 670, 677 (Tex. 2007) (stating that all statutes are presumed to be enacted with full knowledge of existing law).

[103] *See* Cal. Prob. Code § 21311 (West 2011); FLA. STAT. ANN. § 732.517 (West 2010); GA. CODE ANN. § 53-4-68 (West 2003); IND. CODE ANN. § 29-1-6-2 (West 2010); MD. CODE ANN., EST. & TRUSTS § 4-413 (LexisNexis 2001); N.Y. EST. POWERS & TRUSTS LAW § 3-3.5 (Consol. 2006); UNIF. PROBATE CODE § 3-905 (amended 2010), 8 U.L.A. 272 (1998); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.5(c) (2003).

[104] UNIF. PROBATE CODE § 3-905 (amended 2010), 8 U.L.A. 272 (1998).

[105] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.5(c) (2003). "A factor that bears on the existence of probable cause is whether the beneficiary relied upon the advice of independent legal counsel sought in good faith after a full disclosure of the facts." *Id.*

[106] WILLIAM M. MCGOVERN & SHELDON F. KURTZ, WILLS, TRUSTS, AND ESTATES § 12.1 (3d ed. 2004).

[107] *Pirelli*, 247 S.W.3d at 677 (stating that all statutes are presumed to be enacted with full knowledge of existing conditions of law).

of the good faith and probable cause exception.[108] It is presumed that the Texas legislature chose the specific language used over other variations on purpose.[109] An important distinction between the state statutes codifying the UPC and Texas's statutes is that the latter specifically added "good faith" as a prerequisite for bringing the suit and as a standard for maintaining the suit.[110] This variation suggests that the Texas Legislature wanted to provide some additional protection for testators' and settlors' intentions when confronted with jealous, selfish, or ungrateful heirs who try to invoke this exception—not in good faith—as a means to contest the will or trust to gain more for themselves or force an expensive and time consuming settlement.[111] Additionally, California's forfeiture clause statute states probable cause exists if, at the time of filing a contest, "the facts known to the contestant would cause a reasonable person to believe that there is a reasonable likelihood that the requested relief will be granted after an opportunity for further investigation or discovery."[112] This definition can be used as persuasive authority in defining probable cause under the Texas forfeiture clause statutes.[113]

Likewise, the standard for good faith remains undefined under both Texas statutes.[114] The good faith pleading requirement under Rule 13 of the Texas Rules of Civil Procedure ("Rule 13") may provide some guidance regarding what it means to bring and maintain an action in good faith.[115] According to Rule 13, courts presume that pleadings, motions, and documents filed are done in good faith in regard to whether courts may issue sanctions.[116] Rule 13 also states that attorneys and parties signatures verify that "to the best of their knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment."[117] While

[108] *See* sources cited *supra* note 57.

[109] *Pirelli*, 247 S.W.3d at 677.

[110] *See* TEX. PROB. CODE ANN. § 64 (West, Westlaw through 2011 Sess.); UNIF. PROBATE CODE § 3-905 (amended 2010), 8 U.L.A. 272 (1998).

[111] *See* sources cited *supra* note 110.

[112] CAL. PROB. CODE § 21311 (West 2011).

[113] *See id.*

[114] *See* TEX. PROB. CODE ANN. § 64; TEX. PROP. CODE ANN. § 111.038 (West, Westlaw through 2011 Sess.); Beyer & Major, *supra* note 86, at 3.

[115] TEX. R. CIV. P. 13.

[116] *See id.*

[117] *Id.*

the Rule is not directly on point, it provides a solid basis for what constitutes a good faith attempt to file suit in Texas, and seems very relevant to whether a will contest was brought and maintained in good faith.[118] This standard would prevent bitter heirs who are dissatisfied with their share of a testator or settlor's will or trust from bringing suit without a valid basis.[119] This seems to incorporate the idea that a contestant must have solid evidence, apprising him or her of some defect with the will or trust, which will prove that the document does not accurately reflect the testator's true intentions.[120] Whether the contestant possesses knowledge of fraud or of the settlor or testator's mental incompetence, the contestant must have sufficient knowledge of facts before initiating the contest that will allow him or her to reasonably form a good-faith belief that fraud occurred or that the testator was incapacitated after making a "reasonable inquiry" into the legitimacy of those facts.[121] A contestant who is shown to have initiated a groundless will contest out of spite and later, during the trial process, discovers facts that would help him or her succeed in avoiding the forfeiture clause should not be found to implicate the exception, because the contestant lacked good faith when the "action was brought."[122] As stated by the Pennsylvania Supreme Court, the penalty of forfeiture should not be imposed when "it clearly appears that the contest to have the will set aside was justified under the circumstances, and was not the mere vexatious act of a disappointed child or next of kin."[123]

Existing case law in Texas and other jurisdictions that have interpreted what constitutes "good faith" or "probable cause" must also be analyzed to predict how Texas courts will interpret the new statutes. Because the legislative intent of H.B. 1969 is to "clarify existing law,"[124] it is necessary to somehow synthesize what Texas case law has to say about "good faith" and "probable cause" before looking to other jurisdictions' application of the terms. As for the Texas cases that have condoned the exception, they provide little guidance as to what actually constitutes a suit brought in good

[118] *Id.*

[119] *See* Beyer & Major, *supra* note 86, at 3.

[120] *See id.*

[121] *See* TEX. R. CIV. P. 13.

[122] *See* TEX. PROB. CODE ANN. § 64 (West, Westlaw through 2011 Sess.); *see also* TEX. PROP. CODE ANN. § 112.038 (West, Westlaw through 2011 Sess.).

[123] *In re* Friend's Estate, 58 A. 853, 854 (Pa. 1904).

[124] *See* Act of June 19, 2009, 81st Leg., R.S., ch. 414, § 4(c), 2009 Tex. Gen. Laws 995, 996.

faith and upon probable cause to frustrate the intention of the testator.[125] Many Texas cases supported the adoption of the good faith and probable cause exception to forfeiture "in a proper case" but avoided an analysis of that issue by disposing of the case on other grounds.[126] It is clear from Texas case law, however, that any suit brought in good faith and upon probable cause to ascertain the intent of the testator or settlor or to determine the extent of one's devise in a will or trust does not violate an *in terrorem* clause.[127]

Numerous other jurisdictions have applied the good faith and probable cause exception and provide helpful insight as to what Texas courts will find justifies "probable cause" for bringing a contest.[128] In *In re Friend's Estate*, Pennsylvania's Supreme Court noted that it is up to the court distributing the testator's estate to determine what constitutes probable cause.[129] If Texas courts apply the logic used by Pennsylvania, when the probate court has any doubt as to whether probable cause exists, the will or trust will reign supreme, and the testator or settlor's intent to require forfeiture upon a contest will be enforced.[130] In *Friend's Estate*, the court provided a detailed analysis of probable cause and held that the lower court was correct in considering only the information possessed by the contestant, and not evidence introduced by the other party, when making the determination whether probable cause existed for questioning the testator's will.[131] This principle would most likely apply with equal force in Texas, considering the language of the statute.[132] While the statute does not

[125] *See* Calvery v. Calvery, 55 S.W.2d 527, 530 (1932); *see also* First Methodist Episcopal Church S. v. Anderson, 110 S.W.2d 1177, 1184 (Tex. Civ. App.—Dallas 1937, writ dism'd) (finding that the purpose of the contest was to interpret the will rather than to thwart the purpose of the will).

[126] *See Calvery*, 55 S.W.2d at 530; Estate of Newbill, 781 S.W.2d 727, 729–30 (Tex. App.—Amarillo 1989, no writ); Gunter v. Pogue, 672 S.W.2d 840, 843–44 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.); *First Methodist*, 110 S.W.2d at 1184.

[127] *See Calvery*, 55 S.W.2d at 530; Sheffield v. Scott, 662 S.W.2d 674, 677 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.) ("[U]ntil such time as some further action is taken in an effort to thwart the intention of the testator, the mere filing of a contenst motion is insufficient to cause a forfeiture under the *in terrorem* clause."); *First Methodist*, 110 S.W.2d at 1184.

[128] *Friend's Estate*, 58 A. at 854.

[129] *See id.* at 856.

[130] *See id.*

[131] *Id.* at 856 (holding that after a full hearing from both sides on the issue, "it may well be contended that probable cause did not exist; but that is not the test").

[132] Act of June 19, 2009, 81st Leg., R.S., ch. 414, § 1, 2009 Tex. Gen Laws 995, 995 (current

specifically state that the contestant must himself subjectively possess probable cause, when the statute is compared with other Texas statutes, this is the most logical conclusion.[133] Further support for this proposition comes from the Fifth Circuit's "snapshot" test applied in *Skidmore Energy Inc. v. KPMG*.[134] In reviewing whether to issue a sanction under Rule 11 of the Federal Rules of Civil Procedure, the Fifth Circuit limited its focus to the facts and evidence available to the attorney at the time that he filed his complaint—that is the court only considered the attorney's state of mind at the time he signed the pleading.[135] This test strongly suggests that a person who contests a will or trust must only possess subjective probable cause at the time he or she institutes the contest.[136] As for the good faith standard, however, the law prior to the development of this test is more indicative of how the Texas courts will treat a will contestant.[137] Prior to the "snapshot" rule, attorneys in the Fifth Circuit had a continuing obligation to review and reevaluate their positions as the litigation developed to ensure the existence of sufficient evidentiary support for the causes of action being alleged.[138] Due to the language, "brought and maintained," found in Section 64 and Section 112.038 of the Texas Probate and Property Codes, respectively, the preexisting law in the Fifth Circuit provides convincing support for how Texas courts will interpret the good faith standard.[139]

Furthermore, Pennsylvania codified the good faith and probable cause exception in 1994, long after deciding *In re Friend's Estate*, and it includes some of the same language, holding that a penalty clause "is unenforceable

version at TEX. PROB. CODE ANN. § 64 (West, Westlaw through 2011 Sess.)) (keeping in mind that the contestant is always the person bringing the action, the statute states that the forfeiture clause "is unenforceable if: (1) probable cause exists for bringing the action; and (2) the action was brought and maintained in good faith.").

[133] *See id.* The Business and Commerce Code gives a definition for good faith that requires a subjective and objective component. *See* TEX. BUS. & COM. CODE ANN. § 1.201(a)(20) (West 2007); *see also* Houston v. Mike Black Auto Sales, Inc., 788 S.W.2d 696, 699 (Tex. App.—Corpus Christi 1990, no writ) (noting that to be a "consumer" under the DTPA, "[t]he prospective purchaser at least must have approached the seller with the subjective good faith objective of purchasing and show that he possessed the capacity to consummate the transaction").

[134] 455 F.3d 564, 569 (5th Cir. 2006).

[135] *Id.*

[136] *See id.*

[137] *Id.* at 570.

[138] *Id.*

[139] *See id.*; *see also* TEX. PROB. CODE ANN. § 64 (West, Westlaw through 2011 Sess.); TEX. PROP. CODE ANN. § 112.038 (West, Westlaw through 2011 Sess.).

if probable cause exists for instituting proceedings."[140] Much like the Texas statute, there is no blatant subjective requirement indicating that probable cause must exist through the eyes of the contestant.[141] Nevertheless, the fact that *Friend's Estate* is still good law and considering other jurisdictions' similar interpretations of analogous statutory language, there is adequate proof that the test for probable cause should question whether the contestant reasonably believes in the legitimacy for initiating contest proceedings.[142]

In applying the test for probable cause, lawyers and judges in Texas will have to determine which situations or circumstances will actually give rise to probable cause.[143] Some of the relevant factors that helped the contestants in *Friend's Estate* to prove probable cause existed for contesting Mrs. Friend's will included: the presumption that the relations between the parties were all equal; the gross disproportion between the shares given between her sons, J.W. and H.T. and those of her other son, Charles, and the children of her only daughter; the weak and dependent condition of Mrs. Friend; and the influence of James over his mother and his hostility towards his brother and sister and her children.[144] Importantly, the court gave little weight to the fact that an attorney had advised the contest in deciding that probable cause existed,[145] but other jurisdictions have considered the advice of counsel a factor that bears on the issue of probable cause when the attorney gives advice after being apprised of all matters affecting the case, and the contestant acts on the advice in good faith with the belief that there is probable cause for a contest.[146] It is

[140] 20 PA. CONS. STAT. ANN. § 2521 (West 2005) (modeled after the Uniform Probate Code); *see In re* Friend's Estate, 58 A. 853, 854 (Pa. 1904).

[141] 20 PA. CONS. STAT. ANN. § 2521; Act of June 19, 2009, 81st Leg. R.S., ch. 414, § 1, 2009 Tex. Gen. Laws 995, 995 (current version at TEX. PROB. CODE ANN. § 64).

[142] *See* Woolard v. Ferrell, 169 S.W.2d 134, 137 (Tenn. Ct. App. 1942) (stating that probable cause "does not depend on the actual state of the case in point of fact, but upon the honest and reasonable belief of the party commencing the prosecution"); Leavitt, *supra* note 15 at 71 ("The test for probable cause . . . should be that the contestant reasonably believes in the existence of facts on which his claim is based . . . .").

[143] *See* Beyer & Major, *supra* note 86, at 2 (providing multiple definitions of probable cause).

[144] *In re* Friend's Estate, 58 A. 853, 856–57 (Pa. 1904). Mrs. Friend (the testator) had been in a distressed nervous condition for many years, and her mental condition had obviously deteriorated. *Id.* at 56. There was no apparent reason for Friend to discriminate against her granddaughter or her son as she had always expressed love and devotion towards them. *Id.* at 57.

[145] *Id.*

[146] Leavitt, *supra* note 15, at 71; *see* Geisinger v. Geisinger, 41 N.W.2d 86, 93 (Iowa 1950);

possible that Texas will follow suit and take an attorney's advice into account in the determination of probable cause, which places the attorney in a unique position.[147] While the advice must be given in light of all existing facts and in good faith, an attorney can increase his or her client's chances of meeting the burden of proving probable cause if he or she is fully aware of all facts affecting the case and advises the client to go forth with a contest.[148]

Other jurisdictions have identified probable cause as existing in numerous different situations.[149] As one example, probable cause was found to exist where a son erroneously believed that California law governed and his contest was made in good faith, believing that the laws of California applied to the distribution of the estate.[150] There was probable cause to justify an inquiry into the testamentary capacity of a testatrix who had been found of unsound mind and a committee of her person and of her estate had been appointed.[151] Other examples of sufficient facts to show probable cause include: when a testator, who had previously expressed his intent to equally divide his estate among his children, later became physically infirm and surprisingly favored a controlling son in his will;[152] and when a son had always been close with his sick, eighty-one-year-old father and was given almost the entire estate in a will executed two years prior to the will in dispute.[153]

C. What Does "Brought and Maintained in Good Faith" Require?

According to the legislative history of H.B. 1969, when the bill was originally introduced, it only required that "the action [be] brought in good faith."[154] Floor Amendment No. 1 changed this language to "brought and

see also Dutterer v. Logan, 137 S.E. 1, 2–3 (W. Va. 1927) (stating the advice of "able, honorable, and distinguished counsel" influenced the finding of probable cause).

[147] *See* Leavitt, *supra* note 15, at 71.

[148] *Id.*

[149] Jackson v. Westerfield, 61 How. Pr. 399, 408 (N.Y. Sup. Ct. 1881); Tate v. Camp, 245 S.W. 839, 844 (Tenn. 1922); *In re* Chappell's Estate, 221 P. 336, 338 (Wash. 1923); *Dutterer*, 137 S.E. at 4–5.

[150] *Chappell's Estate*, 221 P. at 338.

[151] *Jackson*, 61 How. Pr. at 408.

[152] *Dutterer*, 137 S.E. at 4–5.

[153] *Tate*, 245 S.W. at 844.

[154] H.J. of Tex., 81st Leg., R.S. 4735 (2009).

maintained in good faith."[155] This amendment demonstrates the importance that the legislature placed on the need that a suit to contest a will or trust be maintained in good faith.[156] The legislature observed that problems may arise in the application of the first version and wanted to make sure that contestants drop their suit when facts are revealed or circumstances change in such a way that makes it clear that the testator's intention or purpose is contrary to the contestant's assertions.[157] Furthermore, the legislature might have identified the fact that this language encourages the preservation of judicial resources by forcing a contestant's suit to be dropped once he or she can no longer pursue an attack on the will in good faith.[158] A simple example of this scenario would be when a son brings suit against his deceased father's will contesting his mental capacity. During the suit, once it is established that his father was not mentally incapacitated and intended the provisions of his will to be enforced, the son must drop his suit to contest the will.[159] If he decides that the risk of forfeiture is worth continuing in his suit because he finds that his father's bequest to him is so insignificant compared to what he could obtain as the sole heir of his father, his suit is no longer being maintained in good faith as required by Section 64, and he will forfeit any interest under his father's will and take nothing.[160]

D. Burden of Proof

As a consensus, Texas case law interpreting the possibility of a good faith and probable cause exception emphatically places the burden of proving that probable cause exists upon the contestant.[161] In *Gunter v. Pogue*, the court placed a mandatory duty on the appellees to secure a finding on good faith and probable cause from the judge or jury on the probated will at issue if they intended to use the good faith and probable

[155] *Id.* at 4736.

[156] *See id.*

[157] *See id.*

[158] *Id.*; *see* Gunter v. Pogue, 672 S.W.2d 840, 843 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.); Beyer & Major, *supra* note 86, at 4.

[159] TEX. PROB. CODE ANN. § 64 (West, Westlaw through 2011 Sess.).

[160] TEX. PROB. CODE ANN. § 64; *see In re* Friend's Estate, 58 A. 853, 855–56 (Pa. 1904); Beyer & Major, *supra* note 86, at 3.

[161] Hammer v. Powers, 819 S.W.2d 669, 673 (Tex. App.—Fort Worth 1991, no writ); *Gunter*, 672 S.W.2d at 844 ("If the appellees sought to defeat the no-contest provision, they had the burden to show that their will contest was brought in good faith and upon probable cause.").

cause exception to defeat the forfeiture clause.[162] It follows that the contestant bears a risk of failing to meet this burden, thereby triggering the application of the *in terrorem* clause and the resulting forfeiture.[163] When a large amount of property is at risk to be forfeited under an *in terrorem* clause, the burden of proving both probable cause and good faith in Texas may discourage heirs and beneficiaries from bringing contests.[164] However, it provides little deterrent effect on the jilted heir who received nothing from a will or a trust, and so testators should keep that in mind when divvying up their estate.[165]

Moreover, several cases support the proposition that there must be some evidence to support every allegation upon which the contestant seeks to invalidate or alter the will or trust as a prerequisite to invoking the good faith and probable cause exception to forfeiture.[166] In *Hammer v. Powers*, the court held a forfeiture of rights under the terms of a will would not be enforced where the contest of the will was made in good faith and upon probable cause.[167] However, the court avoided any analysis of what constitutes probable cause because the contestants failed to provide any amount of evidence or plead in any way that their contest was based in good faith and upon probable cause.[168] A case from the District of Columbia, *Barry v. American Security & Trust Co.*, illustrates the necessity of providing evidence supporting each ground for a will contest to prove one is acting in good faith.[169] In this case, Barry contested the testatrix's will alleging mental incapacity of the testatrix and that a third party coerced her to create the will through fraud and undue influence, among several other allegations, all of which lacked any support or evidence.[170] The court declined to adopt the good faith and probable cause exception but alluded

[162] 672 S.W.2d at 845.

[163] *Id.* at 844.

[164] Beyer & Major, *supra* note 86, at 3; *see Gunter*, 672 S.W.2d at 844.

[165] Beyer & Major, *supra* note 86, at 3; *see Gunter*, 672 S.W.2d at 844.

[166] *Hammer*, 819 S.W.2d at 673; *see Gunter*, 672 S.W.2d at 844; *see also* Barry v. Am. Sec. & Trust Co., 135 F.2d 470, 472 (D.C. Cir. 1943) ("[W]e think there was no probable cause for a contest based on the ground of undue influence; and certainly there was not a scintilla of justification for basing a contest on lack of proper execution or mental incapacity.").

[167] 819 S.W.2d at 673.

[168] *Id.*

[169] 135 F.2d at 472 ("Even if probable cause were held to exist with respect to undue influence, this would not justify a contest based on a number of other grounds for which no cause whatever existed.").

[170] *Id.* at 471.

that even if probable cause were found to exist for one of the grounds upon which the will was contested, the lack of evidence for other grounds of contest would preclude the exception to forfeiture's application.[171]

As for the issue of good faith, this is a more difficult assertion for the will contestant to plead and prove. According to Rule 13 of the Texas Rules of Civil Procedure, courts presume all suits are brought in good faith in regards to the issue of sanctioning parties.[172] If this standard applies to the "good faith" required to bring a will or trust contest, then the burden to prove that the contestant either lacked good faith in initiating the contest or failed to maintain good faith throughout the suit will be placed upon the party seeking to enforce the *in terrorem* clause.[173]

E. Applying the Canon of Construction: "Exclusio Alterius"

Another issue the article's author identified when comparing the two statutes enacted under H.B. 1969 is whether the language in Texas Trust Code Section 111.0035 stating that the terms of a trust may not waive the application of the forfeiture clause provision in Section 112.038 implies that the exclusion of this language in the Probate Code provision means the application of Section 64 can be waived in a will.[174] Section 111.0035 of the Texas Trust Code provides the general rule that the terms of a trust prevail over any provision of the subtitle and then proceeds to lay out exceptions to what the terms of the trust may limit.[175] The terms of the trust may not limit: (1) the requirements imposed under Section 112.031; (2) the applicability of Section 114.007 to an exculpation term of a trust; (3) the periods of limitation for commencing a judicial proceeding regarding a trust; (4) a trustee's duty; (5) the power of a court, in the interest of justice, to take action or exercise jurisdiction; and (6) now the applicability of Section 112.038, the forfeiture clause provision.[176] In essence, this means that a trust may not use language in an *in terrorem* that creates a forfeiture of or voids an interest for bringing any court action, regardless of whether

[171] *Id.* at 472–73.

[172] TEX. R. CIV. P. 13; *see also* R.M. Dudley Constr. Co. v. Dawson, 258 S.W.3d 694, 709 (Tex. App.—Waco 2008, no pet.).

[173] *See* TEX. R. CIV. P. 13. *But see Hammer*, 819 S.W.2d at 673.

[174] *Compare* TEX. PROP. CODE ANN. § 111.0035 (West, Westlaw through 2011 Sess.), *with* TEX. PROB. CODE ANN. § 64 (West, Westlaw through 2011 Sess.).

[175] TEX. PROP. CODE ANN. § 111.0035.

[176] *Id.*

the action is brought in good faith with probable cause because this would directly limit the application of Section 112.038.[177] Conversely, Section 64 of the Texas Probate Code has no statutory limitations of this kind, other than it only applies to estates of decedents who died on or after June 19, 2009.[178] Thus, wills left by decedents that died before this date that are currently being probated are not subject to Section 64.[179] Courts will most likely apply the exception as codified, basing their decision off of precedent in Texas that favors the application of the good faith and probable cause exception.[180]

While it may be argued that the exclusion of any statutory language strictly stating that Section 64 applies over the terms of the will allows a testator to waive the exception in an *in terrorem* clause, this argument will most likely fail for several reasons. The codification in the Property Code may have been added simply because there existed a general rule that the terms of the trust prevail and this needed to be addressed as it could conflict with Section 112.038.[181] Since there is no general rule that the terms of a will prevail in the Probate Code, perhaps the legislature simply found it unnecessary to include a provision prohibiting a waiver of the statute.[182] Furthermore, the terms of a will may not violate public policy or run inconsistent with the laws of the state—in this case Section 64.[183] Therefore, if a testator attempted to waive the good faith or probable cause exception, the statute would, in all likelihood, prevail.[184]

VI. THE "JUST CAUSE" AMENDMENTS

Most recently, the Texas Legislature passed Senate Bills 1197 and 1198 as part the ongoing revision of Texas probate and trust law.[185] These two

[177] *See id.*

[178] BEYER, *supra* note 16, § 52.9; *see* TEX. PROB. CODE ANN. § 64.

[179] BEYER, *supra* note 16, § 52.9.

[180] Beyer & Major, *supra* note 86, at 2–3.

[181] *See* TEX. PROP. CODE ANN. § 111.0035(b) (West, Westlaw through 2011 Sess.).

[182] *See* Beyer & Major, *supra* note 86, at 3–4.

[183] *See* 1 FREDERICK K. HOOPS & FREDERICK H. HOOPS, III, FAMILY ESTATE PLANNING GUIDE § 17:23 (4th ed. 1994).

[184] *See id.*; Beyer & Major, *supra* note 86, at 3–4.

[185] Act of Sept. 1, 2011, 82d Leg., R.S., S.B. 1197, § 2 (to be codified at TEX. PROP. CODE ANN. § 112.038); Act of Sept. 1, 2011, 82d Leg., R.S., S.B. 1198, § 1.13 (to be codified at TEX. PROB. CODE ANN. § 64); S. Comm. on Jurisprudence, Bill Analysis, Tex. S.B. 1198, 82d Leg., R.S. (2011); S. Comm. on Jurisprudence, Bill Analysis, Tex. S.B. 1197, 82d Leg., R.S. (2011).

bills amended Section 64 of the Texas Probate Code and Section 112.038 of the Texas Property Code to replace the phrase "probable cause" with "just cause."[186] The term "just cause" has been defined by one Texas probate court as requiring the proceeding to be "based on reasonable grounds and there must have been a fair and honest cause or reason for the actions."[187] This is similar to definitions adduced for probable cause, but it suggests the idea that courts may now have to decide whether a contestant had an element of fairness and honesty in contesting the will.[188]

For now, the legislative history merely indicates that this was a "nonsubstantive" change to the law.[189] While the term "just cause" is used in other sections of the Texas Probate Code accompanying the phrase "good faith," the task of interpreting the nebulous distinction, if any exists, between the phrase "probable cause" and "just cause" as used in Section 64 of the Probate Code and Section 112.038 of the Property Code will be left for the courts to hash out.[190] Until the courts have an opportunity to apply the legislature's chosen language to a potential forfeiture arising from a will contest or trust contest in light of an *in terrorem* provision, scholars and practitioners are best advised to take note of the application of the "probable cause" language as Texas courts and other jurisdictions have attempted to apply it in the past, and determine whether the change in language is truly an inconsequential semantic change to the statutes, or whether this change signifies the legislature's attempt to require something more of will contestants before they obtain the benefit of the forfeiture statutes.

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[186] Act of Sept. 1, 2011, 82d Leg., R.S., S.B. 1197, § 2 (to be codified at TEX. PROP. CODE ANN. § 112.038); Act of Sept. 1, 2011, 82d Leg., R.S., S.B. 1198, § 1.13 (to be codified at TEX. PROB. CODE ANN. § 64).

[187] Estate of Brown, No. 323.033-401, 2004 WL 5031809, at *4 (Prob. Ct. No. 4, Harris County, Tex. Nov. 23, 2004).

[188] *See supra* Part V.B. (citing definitions for probable cause).

[189] *See* S. Comm. on Jurisprudence, Bill Analysis, Tex. S.B. 1198, 82d Leg., R.S. (2011); S. Comm. on Jurisprudence, Bill Analysis, Tex. S.B. 1197, 82d Leg., R.S. (2011).

[190] TEX. PROB. CODE ANN. § 243 (West 2003) ("When any person designated as executor in a will . . . or as administrator with the will . . . defends it or prosecutes any proceeding in good faith, and with *just cause*, for the purpose of having the will or alleged will admitted to probate, whether successful or not, he shall be allowed out of the estate his necessary expenses and disbursements, including reasonable attorney's fees, in such proceedings." (emphasis added)); TEX. PROB. CODE ANN. § 665B (West 2003 & Supp. 2010) (forbidding the court from authorizing attorney's fees under this section "unless the court finds that the applicant acted in good faith and for *just cause* in the filing and prosecution of the application." (emphasis added)).

VII. CONCLUSION

In terrorem clauses can be useful provisions for both testators and settlors to ensure that their donative transfers are carried out as intended.[191] Such provisions prevent unsatisfied beneficiaries from instituting bothersome litigation that may frustrate a testator or settlor's intent.[192] Enforcing *in terrorem* provisions advances several important public policy concerns, including the established concept of testamentary freedom.[193] However, the Texas Legislature officially acknowledged the strong arguments to the contrary by codifying its own version of the "good faith and probable cause" exception.[194] Failing to recognize this exception would allow an individual to get away with taking advantage of a testator or settlor's state of mind by influencing him or her to execute a will or trust that works a detriment upon the testator or settlor's close family members.[195] Furthermore, the public policy supporting every citizen's entitlement to have his or her rights ascertained by a court helps justify the Texas Legislature's decision to codify this exception.[196]

While the original version of the new statutes clarifies that Texas now recognizes the good faith and probable cause exception, there are several issues that Texas courts must resolve in order to refine this area of the law, which will allow testators and settlors to better strategize their donative transfers.[197] Courts will most likely draw the standards for good faith from

[191] *See* Gunter v. Pogue, 672 S.W.2d 840, 842–43 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.).

[192] *See id.*

[193] *Id.* at 842.

[194] TEX. PROB. CODE ANN. § 64 (West, Westlaw through 2011 Sess.) (the current statute has adopted the language "just cause" instead of "probable cause"); TEX. PROP. CODE ANN. § 112.038 (West, Westlaw through 2011 Sess.); Act of June 19, 2009, 81st Leg., R.S., ch. 414, §§ 1–3, 2009 Tex. Gen. Laws 995, 995–96 (current version at TEX. PROB. CODE ANN. § 64 (West, Westlaw through 2011 Sess.) & TEX. PROP. CODE ANN. §§ 111.035, 112.038 (West, Westlaw through 2011 Sess.)).

[195] *See, e.g.*, *In re* Friend's Estate, 209 A. 853, 854 (Pa. 1904) (stating that if a person unduly influenced a testator in writing the will they could have influence the writing of an *in terrorem* clause to protect the bequest from the contest of others).

[196] *See* Calvery v. Calvery, 55 S.W.2d 527, 530 (1932) (stating that a devisee has the right to have her property rights from an unclear devise in a will ascertained by the court).

[197] Act of June 19, 2009, 81st Leg., R.S., ch. 414, §§ 1–3, 2009 Tex. Gen. Laws 995, 995–96 (current version at TEX. PROB. CODE ANN. § 64 (West, Westlaw through 2011 Sess.); TEX. PROP. CODE ANN. §§ 111.035, 112.038 (West, Westlaw through 2011 Sess.)); *see* BEYER, *supra* note 16, § 52.9; Beyer & Major, *supra* note 86, at 3–4.

prior Texas case law and other Texas statutes that have set similar standards.[198] The burden of proof issue will most expectedly be resolved by looking to the Texas Rules of Procedure, prior Texas case law, and then by synthesizing other jurisdiction's treatment of the issue.[199]

With the recent amendments to the forfeiture provisions of the Texas Property Code and Texas Probate Code substituting "probable cause" with a "just cause" standard, practitioners are advised to first understand the exception as it has always been alluded to throughout Texas history—with the "probable cause" requirement.[200] This article revealed that the Uniform Probate Code, as well as several other jurisdictions have adopted the "probable cause" language into their own codification of this exception.[201] Given the legislature's lack of explanation for changing the "probable cause" language to "just cause," and its indication that this change is "nonsubstantive," attorneys interpreting these statutes should continue to rely on those cases interpreting the probable cause language.[202] As to the possibility that the legislature intended "just cause" to require something more, practitioners should be aware of the change and proceed with caution by assuming that the legislature had a purpose or motive behind this change in language.[203] Thus, when an attorney has a will contestant as a client, it would be wise to also examine the statutes within the Probate and Property Codes that use the term "just cause" and prepare for the case as if the new language does require a fair and honest will contest.[204]

How the questions left unanswered by the new provisions to the Texas Property Code and Texas Probate Code will be resolved by the Texas judiciary remains to be discovered. However, prudent practitioners should be aware of the recent forfeiture provisions and advise clients to be extra

[198] TEX. BUS. & COM. CODE § 1.201(a)(20) (West 2007); TEX. R. CIV. P. 13; Skidmore Energy, Inc. v. KPMG, Inc., 455 F.3d 564, 570 (5th Cir. 2006).

[199] *Compare* TEX. R. CIV. P. 13, *with* Haynes v. First Nat'l State Bank, 432 A.2d 890, 898 (N.J. 1981) (stating that the burden of proof shifts to the proponent of the will when issues of undue influence arise) *and* Gunter v. Pogue, 672 S.W.2d 840, 844 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.) (finding "[i]f the appellees sought to defeat the no-contest provision, they had the burden to show that their will contest was brought in good faith and upon probable cause").

[200] Beyer & Major, *supra* note 86, at 2–3.

[201] *See supra* Part III.A.

[202] *See* S. Comm. on Jurisprudence, Bill Analysis, Tex. S.B. 1198, 82d Leg., R.S. (2011); Beyer & Major, *supra* note 86, at 2–3.

[203] *See supra* Part VI.

[204] *See supra* note 190.

cautious after writing a will so as to avoid any conduct that could give potential will contestants "good faith" or "just cause" to contest the will. Until the courts interpret whether or not testators can waive the good faith or just cause exception, including an express waiver of the exception as defined by statute, the *in terrorem* clause is another preventative measure practitioners may take.