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In Terrorem Clauses: More Bark Than Bite?, 25 Loy. U. Chi. L.J. 493 (1994)

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I. INTRODUCTION

An attorney drafting a will may be asked by a client to include a clause that will discourage disgruntled beneficiaries from bringing actions to contest the will. Such a provision is known as an *in terrorem*, no-contest, or forfeiture clause ("*in terrorem*" clause). An *in terrorem* clause is one that provides that any person who contests the will shall forfeit all interests he otherwise would have received under that will.[1]

In most states, *in terrorem* clauses have been held to be valid and not against public policy.[2] However, because most states disfavor forfeiture, they have devised ways to avoid giving effect to such provi-

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1. THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 82, at 408 (2d ed. 1953).

2. *See* 5 WILLIAM J. BOWE & DOUGLAS H. PARKER, PAGE ON WILLS § 44.29, at 469 (4th ed. 1962); *see, e.g.*, Smithsonian Inst. v. Meech, 169 U.S. 398, 412-15 (1898) (holding that an *in terrorem* clause in a will is valid on the basis that such provisions give effect to a testator's clearly expressed intentions); Wilkes v. Freer, 271 F. Supp. 602, 604-07 (D.D.C. 1967) (finding under District of Columbia law that an action to contest a will led to a forfeiture under a no-contest clause); Jackson v. Braden, 717 S.W.2d 206, 208 (Ark. 1986) (holding valid clause which prohibits attack upon will and further providing that if any beneficiary should attack the will, that beneficiary should be barred from receipt of any benefits from the will); *In re* Hite's Estate, 101 P. 443, 444-45 (Cal. 1909) (holding that a will provision revoking devises made to any person contesting the will is not contrary to, but is favored by public policy since it would discourage litigation); Linkous v. National Bank of Georgia, 274 S.E.2d 469, 470 (Ga. 1987) (holding that *in terrorem* clauses, which forbid any challenge to a will under penalty of forfeiture, are statutorily permitted, but are not favored and must be strictly construed); *In re* Estate of Martin, 643 P.2d 859, 864 (N.M. Ct. App. 1981) (recognizing that no-contest clauses are valid and enforceable but are not effective to disinherit a party who has contested a will in good faith and with probable cause), *rev'd sub nom. on other grounds*, New Mexico Boys Ranch, Inc. v. Hanvey, 643 P.2d 857 (N.M. 1982); Alexander v. Rhodes, 474 S.W.2d 655, 659 (Tenn. Ct. App. 1971) (holding a bequest to decedent's stepson conditioned on his dismissing other family litigation was not void as contrary to public policy).

sions.[3] Such practices include strictly construing the language of the *in terrorem* clause,[4] determining that the action taken by a beneficiary does not amount to an action to contest a will,[5] and refusing to enforce such provisions when challenges to the testamentary instrument are made in good faith and with probable cause.[6] As a result of these practices, *in terrorem* provisions are frequently reduced to empty threats.

Although Illinois courts have not expressly passed upon the validity of *in terrorem* clauses, their validity has been assumed.[7] Nonetheless, Illinois courts have, for various reasons, followed the majority of the states in refusing to give such provisions effect in order to avoid forfeiture.[8] As a result, no Illinois appellate court has yet enforced an *in terrorem* clause against a beneficiary who has contested a will.[9]

This article will first examine the policy considerations behind enforcing *in terrorem* clauses.[10] It will then examine the statutory and common law approaches that various jurisdictions take with respect to these clauses.[11] Next, it will analyze the Illinois cases that have dealt with the enforcement of *in terrorem* clauses.[12] Based on these decisions, this article will attempt to predict what the future holds for *in terrorem* clauses in Illinois.[13] It then concludes that while *in terrorem* clauses are presumed valid, the only bite these clauses still have is their uncertain future.[14]

II. THE *IN TERROREM* CLAUSE

An *in terrorem* clause is a provision inserted into a will in an attempt to prevent or deter a contest of the will.[15] Under an *in terrorem* clause,

3. *See infra* part III; Gerry W. Beyer, *Drafting in Contemplation of Will Contests; Stop the Fight Before it Starts*, 38 Prac. Law. 61, 64 (1992).

4. *See infra* text accompanying notes 32-33; 5 BOWE & PARKER, *supra* note 2, § 44.29.

5. *See infra* text accompanying notes 34-36; Beyer, *supra* note 3, at 64.

6. *See infra* text accompanying notes 37-39; 80 AM. JUR. 2D *Wills* § 1575, at 633-34 (1975).

7. *See infra* text accompanying note 40; 2 ROBERT S. HUNTER, ESTATE PLANNING AND ADMINISTRATION IN ILLINOIS § 94.6 (2d ed. 1980).

8. *See infra* part IV.

9. *See id.*

10. *See infra* part II.

11. *See infra* part III.

12. *See infra* part IV.

13. *See infra* part V.

14. *See infra* part VI.

15. ATKINSON, *supra* note 1, § 82, at 408. A typical *in terrorem* clause reads as follows:

a beneficiary risks forfeiting some or all of his or her interest under a will if he or she contests the will or participates in the contest of the will.[16] The beneficiaries under the will cannot waive the effectiveness of the clause because it is inserted for the testator's benefit.[17] Although an overwhelming majority of jurisdictions have upheld such forfeiture conditions in wills,[18] there is a split of authority over whether such provisions should be enforced. This is due in part to the public policy considerations both favoring and disfavoring the enforcement of *in terrorem* clauses. Arguments frequently advanced in favor of enforcing *in terrorem* clauses include: (1) they give full effect to the intent of the testator; (2) they help prevent costly and vexatious litigation; and (3) they reduce bickering among members of the same family.[19]

On the other hand, some courts have asserted that an *in terrorem* clause is a powerful weapon in the hands of a wrongdoer who is named a beneficiary in a will through fraud or undue influence. The

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> In the event any devisee, beneficiary or legatee named herein shall commence or maintain, directly or indirectly, any proceeding to challenge or deny any of the provisions of this Will, the devise, bequest or legacy herein made to him, her, or it, shall lapse and fall.

2A JOSEPH H. MURPHY, MURPHY'S WILL CLAUSES 13-78 (1992). Other examples of *in terrorem* clauses often include a gift over which follows the English rule. *See* 2A *id.* at 13-69 to 13-78; 5 BOWE & PARKER, *supra* note 2, § 44.29, at 470-71. A gift over is a conditional gift to a party other than the initial devisee or legatee, which goes into effect upon the breach of a certain condition, such as the breach of an *in terrorem* clause. 5 BOWE & PARKER, *supra* note 2, § 44.29, at 470-71. Under the English rule, a gift over is required for an *in terrorem* clause to be valid with respect to gifts of personalty. *Id.*

16. Beyer, *supra* note 3, at 63.

17. 80 AM. JUR. 2D *Wills* § 1569 (1975).

18. *See supra* note 2 and accompanying text; *see also* Annotation, *Validity and Enforceability of Provision of Will or Trust Instrument for Forfeiture or Reduction of Share of Contesting Beneficiary*, 23 A.L.R.4th 369, § 3 (1983 & Supp. 1993).

19. *See, e.g.*, Smithsonian Inst. v. Meech, 169 U.S. 398, 412-15 (1898) (holding an *in terrorem* clause valid because it gave effect to a testator's clearly expressed intentions); Rudd v. Searles, 160 N.E. 882, 886 (Mass. 1928) (holding that giving effect to an *in terrorem* clause may "contribute to the fair reputation of the dead and to the peace and harmony of the living"); Commerce Trust Co. v. Weed, 318 S.W.2d 289, 300-01 (Mo. 1958) (holding that the balance of social policy is in favor of no-contest clauses because such clauses serve "to lessen the wastage of the estate in litigation" and lessen "the chance of increasing family animosities"); Estate of Seymour, 600 P.2d 274, 278 (N.M. 1979) (recognizing that no-contest provisions "serve to protect estates from costly and time-consuming litigation and they tend to minimize family bickering over the competence and capacity of testators"); Elder v. Elder, 120 A.2d 815, 819 (R.I. 1956) (holding that *in terrorem* clauses are valid where they are "properly and unambiguously" expressed in a will); Gunter v. Pogue, 672 S.W.2d 840, 842-43 (Tex. Ct. App. 1984) ("The view favoring enforcing these clauses is that they allow the intent of the testator to be given full effect and avoid vexatious litigation, often among members of the same family.").

wrongdoer could then use an *in terrorem* clause to deter a virtuous beneficiary from pursuing a legitimate will contest.[20] Furthermore, enforcement of an *in terrorem* clause by a court against a virtuous contestant could effectively deny the contestant access to the courts.[21] Nevertheless, the majority of courts continue to hold *in terrorem* clauses valid and not against public policy.[22]

III. LIMITATIONS ON *IN TERROREM* CLAUSES

Despite the apparent validity of *in terrorem* clauses, several jurisdictions have developed ways to limit their harsh effects and to prevent fraud. Although these approaches often make enforcement of *in terrorem* clauses less likely, they ultimately lend some predictability to the drafting of wills. The limitations also suggest that in those jurisdictions that have not passed on the ultimate validity of *in terrorem* clauses, it is at least possible that a court will allow enforcement.

A. Statutory Approaches

Several jurisdictions have developed statutory guidelines for the enforcement of *in terrorem* clauses. Most of these states have adopted section 3-905 of the Uniform Probate Code in whole[23] or in part.[24] Under section 3-905, if a beneficiary has probable cause for contesting a will then the *in terrorem* clause is unenforceable.[25] The rationale behind such statutes is that giving effect to the forfeiture provision in all cases might discourage a person who had a legitimate basis for challenging the will.[26]

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20. *See* Ryan v. Wachovia Bank & Trust Co., 70 S.E.2d 853, 856-57 (N.C. 1952) (holding that "our courts should be as accessible for those who in good faith and upon probable cause seek to have the genuineness of a purported will determined, as they are to those who seek to find out the intent of a testator in a will whose genuineness is not questioned").

21. *Gunter*, 672 S.W.2d at 843 (reasoning that an *in terrorem* clause should not operate to exclude devisees who attempt in good faith to discern the testator's intent and have probable cause to bring the action).

22. *See supra* note 2 and accompanying text.

23. *See* ME. REV. STAT. ANN. tit. 18-A, § 3-905 (West 1981); MINN. STAT. ANN. § 524.3-905 (West 1975); N.J. STAT. ANN. § 3B:3-47 (West 1983); N.D. CENT. CODE § 30.1-20-05 (1976); S.C. CODE ANN. § 62-3-905 (Law. Co-op. 1987 & Supp. 1993).

24. MICH. COMP. LAWS ANN. § 700.168 (West 1980).

25. 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." UNIF. PROBATE CODE § 3-905, 8 U.L.A. 383 (1983).

26. *See* Barry v. American Security & Trust Co., 135 F.2d 470, 474 (D.C. Cir. 1943) (dissenting opinion) ("If fraud, coercion and undue influence . . . can be covered up and made secure by the insertion of a forfeiture condition into a will . . . we may, instead, be

Other jurisdictions have codified their common law approaches, or have adopted various combinations of their common law and the Uniform Probate Code.[27] Finally, at least two jurisdictions have enacted legislation which renders *in terrorem* clauses unenforceable under all circumstances.[28]

B. Common Law Approaches

In jurisdictions where the state legislatures have not codified an approach to deal with *in terrorem* clauses, courts generally follow one of three prevailing common law approaches. Some courts strictly construe the terms of an *in terrorem* clause to determine whether the contestant's actions are within the scope of the *in terrorem* clause.[29] Other courts may determine that a beneficiary's action does not amount to an action to contest the will but is rather one for construction.[30] Still other courts utilize a common law good faith and probable cause test.[31]

Courts adopting the first approach strictly construe the terms of *in terrorem* clauses and attempt to interpret the language of these clauses in favor of the beneficiary in order to avoid forfeiture.[32] However, *in terrorem* clauses are usually held valid and enforceable, thereby requiring courts to give effect to the intent of the testator. As a result of this dichotomy, many courts strictly construe the language of the *in terrorem* clause, limiting the scope of the language to what is minimally necessary to give effect to the testator's intent.[33]

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putting another weapon into the hands of the racketeer.").

27. *See* CAL. PROB. CODE § 21301 (West 1991); *see also* N.Y. EST. POWERS & TRUSTS LAW § 3-3.5 (McKinney 1981 & Supp. 1994). The New York statute gives effect to no-contest clauses despite the presence of probable cause for bringing the contest. *Id.* However, the New York statute does recognize a number of exceptions, including the following: (i) a contest brought with probable cause that the will was forged or revoked; (ii) objection to the jurisdiction of the court; (iii) a contest brought on behalf of an infant or incompetent; or (iv) an action to construe the will's terms. *Id.*

28. *See* FLA. STAT. ANN. § 732.517 (West 1988); IND. CODE ANN. § 29-1-6-2 (West 1979) (adopting the language of the Uniform Probate Act § 3-905, but omitting "if probable cause exists for instituting proceedings").

29. *See infra* notes 32-33 and accompanying text.

30. *See infra* notes 34-36 and accompanying text.

31. *See infra* notes 37-39 and accompanying text.

32. *See, e.g.*, Scharlin v. Superior Court, 11 Cal. Rptr. 2d 448, 452 (Cal. Ct. App. 1992); Poag v. Winston, 241 Cal. Rptr. 330, 337 (Cal. Ct. App. 1987); *In re* Westfahl, 674 P.2d 21, 24 (Okla. 1983); Gunter v. Pogue, 672 S.W.2d 840, 842 (Tex. Ct. App. 1984).

33. *See, e.g.*, *Poag*, 241 Cal. Rptr. at 337 (holding that *in terrorem* clauses are to be strictly construed with "no wider scope given language than clearly is necessary to give effect to its intent"); Kolb v. Levy, 110 So. 2d 25, 28 (Fla. Dist. Ct. App. 1959) (holding that legatee's claims in estate of deceased testatrix and subsequent action against executrix for declaratory relief was not a contest within the plain meaning of the

Most *in terrorem* clauses indicate that a beneficiary forfeits his or her interest if he or she brings or participates in a "will contest." In order to avoid forfeiture, some courts have held that certain actions brought by beneficiaries do not constitute "will contests." For example, it has generally been held that an action to construe a will is not a challenge to the will's basic validity.[34] A will contest has been defined as "any legal proceeding designed to result in the thwarting of the testator's wishes as expressed in the will."[35] Actions for construction, however, seek only to have the court declare or give instructions regarding the testator's intentions. Therefore, under the second approach, these actions do not invoke the punitive effects of *in terrorem* clauses.[36]

Under the third approach, some courts avoid forfeiture of a beneficiary's interest even when the action truly is a will contest by making an exception for actions that are brought in good faith and with probable cause.[37] Under this approach, courts will not enforce an *in*

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in terrorem clause); *In re* Estate of Hodges, 725 S.W.2d 265, 268 (Tex. Ct. App. 1986) ("[O]nly where the acts of the parties come strictly within the clause may a breach thereof be declared.").

34. *See, e.g.*, Ellsworth v. Arkansas Nat'l Bank, 109 S.W.2d 1258, 1262 (Ark. 1937) (holding that a suit for construction of a will was "one of character contemplated by testatrix"); *In re* Vanderhurst's Estate, 154 P. 5, 8 (Cal. 1915) (holding that legatee's suit opposing petition of other legatees for distribution does not show a contest of the will, but a proceeding for its construction); South Norwalk Trust Co. v. St. John, 101 A. 961, 963 (Conn. 1917) (holding that if legatee's action is "merely one to determine the true construction of the will . . . the action could not be held to breach the ordinary forfeiture clause, for the object of the action is not to make void the will, or any of its parts, but to ascertain its true legal meaning"); Wells v. Menn, 28 So. 2d 881, 885 (Fla. 1946) (holding that no-contest clauses will not be enforced against a legatee who files a bill for construction of a will); Geisinger v. Geisinger, 41 N.W.2d 86, 93 (Iowa 1950) (holding that legatees' action for construction of will and codicils did not invoke will provision for forfeiture of rights of any legatee who attempted by contest of the court to break will or object to probate thereof); George v. George, 141 S.W.2d 558, 560 (Ky. Ct. App. 1940) (holding that a proceeding brought under Declaratory Judgment Act was not an "attempt to contest [a] will").

35. *Westfahl*, 674 P.2d at 24.

36. *Estate of Hodges*, 725 S.W.2d at 268.

37. *See, e.g.*, South Norwalk Trust Co. v. St. John, 101 A. 961, 963 (Conn. 1917) (holding that a beneficiary does not forfeit his rights under a no-contest provision by bringing a contest for which there is a reasonable ground); *In re* Cocklin's Estate, 17 N.W.2d 129, 132 (Iowa 1945) (holding that while *in terrorem* provisions are valid, they will not be enforced against one who contests a will in good faith and for probable cause); *In re* Estate of Foster, 376 P.2d 784, 786 (Kan. 1962) (holding that an *in terrorem* clause will not be applied to a legatee who contests a will with bona fide belief in its invalidity because "a beneficiary who attacks a will upon rules based upon public policy is merely serving the public"); Hartz' Estate v. Cade, 77 N.W.2d 169, 171-72 (Minn. 1956) (finding that where a beneficiary's will contest was "begun and prosecuted in good faith and with probable cause" and was not "frivolous, vexatious nor actuated by malice," beneficiary could take under will despite no-contest provision); Haynes v. First Nat'l State Bank, 432 A.2d 890, 904 (N.J. 1981) (holding that *in terrorem* clauses in a

terrorem clause when the contestant has probable cause to challenge the will.[38] This common law approach is very similar to the approach set forth in section 3-905 of the Uniform Probate Code.[39]

IV. THE ILLINOIS APPROACH TO ENFORCEABILITY OF *IN TERROREM* CLAUSES

Illinois courts have not expressly established the validity or enforceability of *in terrorem* clauses. Nor has the legislature adopted a statute concerning the validity or enforceability of such clauses. Although Illinois courts have recognized that *in terrorem* clauses are valid in other jurisdictions,[40] the decisions indicate that Illinois courts do not favor forfeiture.[41] Rather, when faced with such a clause, Illinois

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will or trust agreement are unenforceable where there is probable cause to challenge the instrument); *In re* Estate of Seymour, 600 P.2d 274, 278 (N.M. 1979) (holding that will contests made in good faith and with probable cause do not jeopardize a beneficiary's interest); Ryan v. Wachovia Bank & Trust Co., 70 S.E.2d 853, 854-55 (N.C. 1952) (holding that the purpose of an *in terrorem* provision is to prevent vexatious litigation by disappointed beneficiaries and such provision is valid in law, but where contestant acts in good faith and with probable cause, such a condition in a will is not binding and will not lead to a forfeiture); Wadsworth v. Brigham, 259 P. 299, 306 (Or. 1927) (holding that a provision in a will that any contestant should receive five dollars only was void as against public policy as to party contesting will in good faith); *In re* Friend's Estate, 58 A. 853, 854-55 (Pa. 1904) (holding that although no-contest provisions in will are valid, they will not be enforced where the contest was justified under the circumstances); Rouse v. Branch, 74 S.E. 133, 134-135 (S.C. 1912) (holding that a gift is not forfeited by a contest based on probable cause); Tate v. Camp, 245 S.W. 839, 844 (Tenn. 1922) (holding that interest of legatee will not be forfeited under *in terrorem* clause, where contest was prosecuted in good faith and for probable cause).

38. *See Westfahl*, 674 P.2d at 24-25; Hammer v. Powers, 819 S.W.2d 669, 673 (Tex. Ct. App. 1991); *Seymour*, 600 P.2d at 278. *But see* Rudd v. Searles, 160 N.E. 882, 886 (Mass. 1928) (holding that a provision in a will for forfeiture of legacy in event of contest by beneficiary and for gift over upon such forfeiture is valid and not objectionable as against public policy even if contestant institutes proceedings opposing will upon probable cause and upon an honest belief because "such an exception violates the deliberately expressed purpose of the testator"); Commerce Trust Co. v. Weed, 318 S.W.2d 289, 301 (Mo. 1958) (holding that a "no-contest" provision in a will is valid and must be enforced without regard to any exception based upon the good faith and probable cause of the contestant); Elder v. Elder, 120 A.2d 815, 819-20 (R.I. 1956) (holding that forfeiture of a beneficiary's interest is not contrary to public policy even though the will contest is made in good faith and for probable cause).

39. *See supra* notes 25-26 and accompanying text.

40. *See, e.g.*, Budlong v. Los Angeles Bible Institute, 16 N.E.2d 810, 817 (Ill. App. Ct. 1938) (declining to determine the validity of a provision in a will providing that in the event any beneficiary contests the will, such beneficiary should lose all benefit thereunder, but recognizing that such provisions have been held valid in another jurisdiction).

41. *E.g.*, Clark v. Bentley, 76 N.E.2d 438, 441 (Ill. 1947) ("[E]quity does not favor forfeitures, and in construing conditions, both precedent and subsequent, a reasonable construction must be given in favor of the beneficiary.") (citations omitted).

courts will construe the forfeiture provision in favor of the beneficiary.[42] Such a strong public policy is demonstrated by the fact that to date, no Illinois appellate court has enforced a forfeiture under an *in terrorem* clause against a beneficiary.

Illinois courts generally follow the common law approaches adopted by other states when confronted with an *in terrorem* clause.[43] For example, when there is a possibility of forfeiture under an *in terrorem* clause, Illinois courts have strictly construed the language of the clause.[44] In doing so, Illinois courts examine the precise terms of the *in terrorem* clause and narrowly interpret their meaning. For example, in *Clark v. Bentley,*[45] the Illinois Supreme Court examined the meaning of "contest" in the context of an *in terrorem* clause.[46] In *Clark*, testator William Bentley devised his real property to his widow for life with the remainder in his children.[47] Several years after the will was probated, the testator's children issued quitclaim deeds of their interest in the land to the testator's widow.[48] The widow then quitclaimed an undivided one-twelfth interest in the rents and profits from the land to each of the children, and she and the children conveyed by warranty deed two parcels of the land to parties not named in the will.[49]

Subsequently, Mildred Clark, a grandchild and heir at law of the testator, brought an action for construction of the will and appointment of a receiver.[50] Clark claimed that the conveyances made by warranty and quitclaim deed were attempts to alter or change the will and thus violated the *in terrorem* clause.[51] The *in terrorem* clause provided that if any of the testator's children, grandchildren, or *cestui que trust* under the will contested the validity or attempted to vacate, alter or change the will, they would forfeit any beneficial interest except one dollar.[52]

In its first reported opportunity to rule directly on an *in terrorem*

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42. *Id.*

43. See *supra* part III.B for a discussion of the common law approaches most commonly followed by other states.

44. *See, e.g.*, Oglesby v. Springfield Marine Bank, 184 N.E.2d 874, 879 (Ill. 1962); *Clark*, 76 N.E.2d at 440-41; Van Brunt v. Osterlund, 115 N.E.2d 909, 912 (Ill. App. Ct. 1953).

45. 76 N.E.2d 438 (Ill. 1947).

46. *Id.* at 440-41.

47. *Id.* at 439.

48. *Id.* at 440.

49. *Id.*

50. *Clark*, 76 N.E.2d at 439.

51. *Id.* at 440.

52. *Id.*

clause, the Illinois Supreme Court reasoned that the testator intended that only a *court proceeding* would trigger the forfeiture effects of the *in terrorem* clause.[53] The court noted that "contest" has been defined as: "[t]o make a subject of litigation; to dispute or resist by course of law; to defend, as a suit; to controvert."[54] Based on its analysis of the will as a whole and its strict construction of the term "contest," the Illinois Supreme Court determined that since the widow's and children's actions were not court proceedings, there was no forfeiture under the *in terrorem* clause.[55]

Illinois courts have also avoided declaring a forfeiture under an *in terrorem* clause by reasoning that a beneficiary's action is one for construction rather than one contesting a will.[56] For instance, in *Knight v. Bardwell,*[57] two beneficiaries under a will brought an action for construction of their step-grandmother's will, under which they were to receive specific bequests of 150 shares of corporate stock.[58]

53. *Id.* at 440-41.

54. *Id.* (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1953)).

55. *Clark*, 76 N.E.2d. at 441. Similarly, in Oglesby v. Springfield Marine Bank, 184 N.E.2d 874 (Ill. 1962), the only other Illinois Supreme Court decision directly ruling on forfeiture under an *in terrorem* clause, the court also used the strict construction approach and found that the actions of a beneficiary did not fall within the language of the *in terrorem* clause. *Id.* at 879. In *Oglesby*, two residuary beneficiaries sought an adjudication that their sister had forfeited her rights as a beneficiary under her mother's will, which contained an *in terrorem* clause. *Id.* at 876-77. The plaintiffs alleged that because she had appeared and defended individually and as trustee under her brother's estate, their sister had violated the *in terrorem* provision and could take nothing under the will. *Id.* The *Oglesby* court reasoned that due to the beneficiary's peculiar position, "such action should not be held to come within the forfeiture clause unless the language of the will is so clear as to leave no doubt as to its application." *Id.* at 879.

In 1953, the Illinois Appellate Court, Second District, examined the word "action" in the context of an *in terrorem* clause. Van Brunt v. Osterlund, 115 N.E.2d 909, 912 (Ill. App. Ct. 1953). In *Van Brunt*, the court considered whether a devisee's failure to file an answer in another suit related to the same will constituted an "action" triggering forfeiture under the *in terrorem* clause. *Id.* at 912. The *Van Brunt* court strictly construed the term "action," and, looking to the intent of the testator and the ordinary use of the term, determined that "action" meant "some affirmative action." *Id.* Therefore, the devisee's failure to file an answer did not result in a forfeiture. *Id.*

56. *See, e.g.*, Knight v. Bardwell, 195 N.E.2d 428, 436 (Ill. App. Ct. 1963), *rev'd on other grounds*, 205 N.E.2d 249 (Ill. 1965), discussed *infra* notes 57-65 and accompanying text. An action for construction does not ordinarily result in a forfeiture under an *in terrorem* clause. *See supra* notes 35-36 and accompanying text. Moreover, a challenge to the appointment of an executor or to the accounting made by that person is generally not considered a challenge to the will. *See* Estate of Wojtalewicz v. Woitel, 418 N.E.2d 418 (Ill. App. Ct. 1981).

57. 195 N.E.2d 428 (Ill. App. Ct. 1963), *rev'd on other grounds*, 205 N.E.2d 249 (Ill. 1965).

58. *Knight*, 195 N.E.2d at 428-29.

The stock had split twice in the time between the execution of the will and the testator's death.[59] The beneficiaries asserted that the testator included the shares from the stock splits in the bequest to them.[60] The residuary legatee, a charitable corporation, argued that the testator's failure to increase the stated number of shares in a codicil she executed after the first stock split evidenced her intent to omit the stock resulting from the splits from the step-grandchildren's bequest.[61] The residuary legatee also asserted that the step-grandchildren's initiation of the suit invoked the effects of an *in terrorem* clause included in a codicil to the testator's will.[62] The *in terrorem* clause called for the forfeiture of all but five dollars to any beneficiary who directly or indirectly contested the validity, objected to the distribution, or attempted to defeat any of the will's provisions.[63]

Agreeing with the lower court that no forfeiture occurred, the appellate court awarded all of the shares from the stock splits to the step-grandchildren.[64] The court found that "[the suit] was brought only for the purpose of ascertaining what distribution was intended by the testator with implicit acquiescence in the carrying out of such distribution as the court might find was intended."[65] Although the step-grandchildren did not directly contest the validity of the will and codicils, an argument could be made that, contrary to the express language of the *in terrorem* clause, they directly or indirectly objected to the distribution provided by the will.

Recently, Illinois courts have avoided enforcing a forfeiture under an *in terrorem* clause solely on the grounds of public policy.[66] In

59. *Id.*

60. *Id.* at 432.

61. *Id.* at 431.

62. *Id.* at 435.

63. *Knight*, 195 N.E.2d at 435-436.

64. *Id.*

65. *Id.* at 436. On appeal, the Supreme Court of Illinois relied upon rules of will construction to reverse the appellate court. Knight v. Bardwell, 205 N.E.2d 249 (Ill. 1965). The Supreme Court did not disturb the appellate court's reasoning that the suit for construction did not violate the *in terrorem* clause. *Id.* In a Fourth District case, the Illinois Appellate Court declined to enforce a forfeiture under an *in terrorem* clause, finding that the action was one for construction. Nairn v. Stemmler, 309 N.E.2d 237 (Ill. App. Ct. 1974) (abstract only).

66. Estate of Wojtalewicz v. Woitel, 418 N.E.2d 418, 420 (Ill. App. Ct. 1981). Similarly, the Illinois Supreme Court stated in *Oglesby* that forfeiture might be unconscionable even where the contestant's actions explicitly came within the ambit of the *in terrorem* clause. Oglesby v. Springfield Marine Bank, 184 N.E.2d 874, 879 (Ill. 1962). However, the court avoided forfeiture without resorting to an analysis of unconscionability. *Id.*

Estate of Wojtalewicz v. Woitel,[67] a legatee under a will filed a petition to deny appointment of the executor of the estate.[68] The legatee alleged that the executor made no attempt to have the will admitted into probate for nearly one year after the death of the testator and failed to file estate and inheritance tax returns.[69] As a result, the estate incurred substantial penalties.[70] Although it found that the legatee brought the action in good faith, the trial court denied the legatee's petition to deny the appointment.[71]

Subsequently, the executor filed a petition seeking instructions as to the distribution of the contesting legatee's legacy.[72] The executor claimed that the legatee forfeited his legacy under the terms of the *in terrorem* clause by initiating the petition to deny the executor's appointment.[73] The *in terrorem* clause called for the forfeiture of the legacy of anyone who, directly or indirectly, commenced or maintained any proceeding to challenge or deny any of the will's provisions.[74] Denying the executor's petition, the trial court found the *in terrorem* clause valid but found that the legatee's action did not violate the clause.[75]

On appeal, the executor contended that the legatee's action fell within the provisions of the *in terrorem* clause and that not enforcing the clause would violate the testator's intent.[76] The appellate court agreed with the executor that the testator's intent in the *in terrorem* clause was clear and unambiguous and that the provision of the will naming the executor fell within the ambit of this clause.[77] Nevertheless, the court also determined that enforcement of the *in terrorem* clause in this case would contravene public policy.[78]

Supporting its decision, the court reasoned that enforcement of the *in terrorem* clause would deprive the legatee of his statutory right to challenge the appointment of an executor who has failed to enter the will into probate within 30 days after learning that he is named execu-

67. 418 N.E.2d 418 (Ill. App. Ct. 1981).
68. *Id.* at 419.
69. *Id.*
70. *Id.*
71. *Id.* at 419, 421.
72. *Estate of Wojtalewicz*, 418 N.E.2d at 419.
73. *Id.* at 419-20.
74. *Id.*
75. *Id.* at 420.
76. *Id.*
77. *Estate of Wojtalewicz*, 418 N.E.2d at 420.
78. *Id.*

tor in the will.[79] The court also noted that enforcement of the *in terrorem* clause would endanger the assets of the estate by terrorizing the legatee into standing by silently while the executor risked the estate's assets.[80] Public policy prevented the forfeiture of the legacy despite the legatee's actions, which were clearly within the scope of a valid *in terrorem* clause.

V. THE FUTURE OF *IN TERROREM* CLAUSES AND DRAFTING TIPS TO AID IN INCREASING THE RISK OF FORFEITURE

Although the result reached by the court in *Estate of Wojtalewicz* is consistent with earlier decisions of Illinois courts, it also seems to suggest that the courts may be willing to enforce a forfeiture in the future. The court ardently rejected the lower court's finding that the legatee's actions were not within the *in terrorem* clause's scope.[81] This may suggest that public policy might not prevent the forfeiture of an imprudent beneficiary's legacy if that beneficiary brought a contest action lacking good faith or a statutory right.

The prospect of future enforcement of *in terrorem* clauses is, of course, uncertain. The legislature could eliminate the uncertainty by filling in the void and spelling out the proper public policy. However, the uncertainty of forfeiture may be a desired effect. Such uncertainty helps to place the beneficiary in a quandary of whether to contest the will and risk forfeiture or to accept the share bequeathed under the will. Careful drafting of the *in terrorem* clause can help achieve this effect.[82] In order to create such a quandary, the *in terrorem* clause must be coupled with a large enough bequest to arouse hesitation and fear of forfeiture in the beneficiary. If the bequest is substantially less than that which the beneficiary stands to gain by contesting the will, then the *in terrorem* clause will likely fail because the beneficiary will not fear the forfeiture of the insubstantial amount and will not hesitate to contest the will.[83]

Additionally, the drafter can indicate what actions will invoke the *in terrorem* clause's effects in order to increase the potential for forfeiture. Obviously, contesting the will in a court of law should trigger the forfeiture, but the clause can contain a broader range of proscribed actions.[84] The *in terrorem* clause could specify precisely when forfei-

79. *Id.* (citing ILL. REV. STAT. ch. 110 1/2, ¶ 6-3 (1977)).
80. *Estate of Wojtalewicz*, 418 N.E.2d at 420.
81. *Id.*
82. See Beyer, *supra* note 3, at 64.
83. *See* HUNTER, *supra* note 7, at 100.
84. See Beyer, *supra* note 3, at 65.

ture is to become effective, such as upon the filing of the action or after proceedings first begin.[85] Indirect actions, such as assisting another contestant or participating in secret agreements with other beneficiaries to aid in contests, might also be considered and included in the *in terrorem* clause.[86] Although often not required, the testator should consider making a gift over[87] of the forfeited benefits. Providing for the gift to pass to large charitable organizations or others willing to fight the contest might ensure that some party will make an attempt to enforce the *in terrorem* clause.[88] *In terrorem* clauses are likely to be effective only in sizable estates with enough assets to place beneficiaries in the desired forfeiture quandary. In such cases, the size of the estate would also encourage others to aid in the fight of the contest by attempting to enforce the *in terrorem* clause against the contestant.

VI. CONCLUSION

In terrorem clauses are presumed to be valid and are not against public policy *per se*. However, in construing such provisions, Illinois courts strive to avoid forfeiture of benefits under a will. As a result, no beneficiary's gift under a will has yet been subjected to forfeiture in Illinois. Nevertheless, *in terrorem* clauses are still potentially effective in discouraging litigation.

Although mostly bark rather than bite, recent cases such as *Estate of Wojtalewicz* suggest that Illinois courts may be more willing to enforce a forfeiture against a beneficiary bringing a spurious action to contest a will. This uncertainty increases the deterrent effect which helps to achieve the testator's ultimate objective, to avoid will contests.

85. *Id.*
86. *Id.*
87. *See supra* note 15.
88. *Id.*