Title

Hunter v. Hunter, Trustee, 838 S.E.2d 721 (Va. 2020): A valuable contribution to *in terrorem*/no-contest jurisprudence in the context of trusts

Text

Justice D. Arthur Kelsey's opinion in the 2020 Virginia case of *Hunter v. Hunter, as Trustee of the Third Amended and Restated Theresa E. Hunter Revocable Living Trust*, is a tour de force, on a par with decisions authored by the likes of Justice Horace Gray (1828-1902) and other such scholar-jurists of years long gone by. Gray's *Jackson v. Philips*, 96 Mass. 539 (1867), particularly comes to mind. Thorough, clear, concise, jurisprudentially contextual, jargon-free, and rock solid when it comes to applying the common law as enhanced by equity, Kelsey's opinion masterfully and efficiently--efficiency of language was not Gray's strong point--lays out the past, present, and likely future state of the law when it comes to the enforceability of *in terrorem*/no-contest clauses in trust instruments. Such clauses are covered generally in §5.5 of *Loring and Rounds: A Trustee's Handbook* [pages 438-445 of the 2020 Edition]. The relevant portions of the section are reproduced in the appendix below.

Appendix

§5.5 Involuntary or Voluntary Loss of the Beneficiary's Rights
[from *Loring and Rounds: A Trustee's Handbook* (2020), with enhancements]

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No-contest or *in terrorem* provisions. *Introduction.* In the context of outright testamentary dispositions under wills, the anti-contest provision was traditionally the domain of equitable-election jurisprudence, a topic that is taken up generally in §8.15.82 of this handbook.[1] In the trust context, however, the fact that a trust does not necessarily terminate as of the death of the settlor, coupled with the fiduciary principle, complicates matters: How to separate the true contest from the good faith effort to seek a judicial clarification of some ongoing equitable right, duty, or obligation, as well as from the good faith effort to seek to have some breach of trust remedied.[2]

A "no-contest" or "*in terrorem*" or "anti-contest" clause in a trust instrument provides for the forfeiture or reduction of the interest of a beneficiary who "contests" the arrangement.[94] In the face of such a clause, even a minor beneficiary's equitable interest could be at risk were a contest to be initiated on his or her behalf.[95] The hope is that the beneficiaries (or their surrogates) will be deterred from engaging in costly litigation against the trustee, and one another, and in generally subjecting the settlor's personal affairs to unwanted publicity. "Such clauses promote the public policies of honoring the intent of the donor and discouraging litigation by persons whose expectations are frustrated by the donative scheme of the

[1] *See* Smithsonian Institution v. Meech, 169 U.S. 298 (1898).

[2] *See generally* Hunter v. Hunter, Trustee, 838 S.E2d 721 (2020).

[94] *See generally* Annot., *Validity and enforceability of provisions of will or trust instrument for forfeiture or reduction of share of contesting beneficiary*, 23 A.L.R.4th 369 (1983).

[95] *See, e.g.*, EGW v. First Fed. Sav. Bank, 2018 WY 25, 413 P.3d 106 (Wyo. 2018).

instrument."[96] Some courts have enforced such clauses.[97] (One court would even go so far as to enforce a provision forfeiting the equitable interest of a trust beneficiary who urges or voluntarily aids someone else to contest.)[98] Other courts, however, citing public policy considerations, do not enforce *in terrorem*/no-contest clauses.[99]

In recognition of the fact that "the validity of no-contest clauses is not universally accepted, nor is (where these clauses are valid) the probable-cause exception," such clauses are generally construed narrowly.[100] In one case, the court held that a trust beneficiary's sending of litigation-threatening letters to the lawyer who had drafted the trust instrument and to another beneficiary was not the kind of contesting that the instrument's no-contest clause had been designed to deter.[101] In another case, the filing by a trust's beneficiaries of a regulatory misconduct complaint against trust counsel was held not to trigger the instrument's no-contest clause, this even though the complaint contained passages that were critical of the trustees.[3]

Mesopotamia. Since time immemorial testators have been inserting *in terrorem* provisions into their wills. "A Mesopotamian will from the thirteenth century B.C. declared that the disgruntled beneficiary must 'set his cloak upon the doorbolt' and then 'depart into the street' as his more respectful brother acquired the entire inheritance."[4] In those days loss of the protection of the family was indeed a terrifying prospect.

England. In England, a no-contest clause is probably enforceable, provided it is coupled with an express gift over.[102] Overreaching is always a concern. The *in terrorem* clause contained in the 1046 will of the widow Wolgith for the benefit of King Edward the Confessor and others, for example, is the type of clause that one who is concerned about enforceability should probably avoid: "[A]nd, he who would ignore my will, which I have executed with the witness of God, may he be denied this earth's joy and may the Almighty Lord who created and shaped all beings shut him out of the gathering of all the holy ones on Doomsday; and, may he be taken to Satan, the devil, and to all his be damned companions, to the pit of Hell, and there

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[96]Donkin v. Donkin, 314 P.3d 780, 787 (Cal. 2013) ("In tension with these public policy interests are the policy interests of avoiding forfeitures and promoting full access of the courts to all relevant information concerning the validity and effect of a will, trust, or other instrument.").

[97]*See generally* Annot., *Validity and enforceability of provisions of will or trust instrument for forfeiture or reduction of share of contesting beneficiary*, 23 A.L.R.4th 369 (1983). *See also* Restatement (Third) of Property (Wills and Other Donative Transfers) §8.5 (providing that a provision in a donative document purporting to rescind a donative transfer to, or a fiduciary appointment of, any person who institutes a proceeding challenging the validity of all or part of the document is enforceable unless probable cause existed for instituting the proceeding).

[98]*See* Estate of Stewart, 230 Ariz. 480, 286 P.3d 1089, 1094 (Ct. App. 2012) (The court, however, would not enforce a provision forfeiting the interests of a trust beneficiary who is subpoenaed to testify in a court proceeding or to provide documentary evidence or when sworn to provide truthful testimony in court.).

[99]*See generally* Annot., *Validity and enforceability of provisions of will or trust instrument for forfeiture or reduction of share of contesting beneficiary*, 23 A.L.R.4th 369 (1983).

[100]Restatement (Third) of Trusts §96 cmt. e. Equity's disfavor of forfeitures, a topic that is taken up in §8.12 of this handbook, has been said to underpin the principle that *in terrorem* (no-contest) clauses are to be narrowly construed. *See, e.g.*, Ruby v. Ruby, 2012 Il App (1st) 103210, 973 N.E.2d 361 (Ill. App. Ct. 2012).

[101]*See* Rafalko v. Georgiadis, 777 S.E.2d 870 (Va. 2015).

[3] *See* Heslin v. Lenahan, 836 S.E.2d 793 (S.C. Ct. App. 2019). The complaint in question had been filed with the South Carolina Office of Disciplinary Counsel.

[4] *See* Hunter v. Hunter, Trustee, 838 S.E.2d 721 (Va. 2020).

[102]Lewin ¶5-10 (England).

suffer, with the enemies of God, without ceasing, and never bother my heirs."[103]

Three categories of contest. In the case of the trust, there are really three categories of "contest." One can contest the circumstances surrounding a trust's creation,[104] its purposes, or *how* it is being administered, or any combination thereof. Assuming that the settlor intended to impress a trust upon the property, not to make a gift to the "trustee," then it would seem inconsistent with the concept of the trust for a court to apply a "no contest" clause to the third category, *e.g.*, good-faith actions brought by beneficiaries to construe the terms of governing instruments or to remedy breaches of trust.[105] As to the latter, the breach of the duty of loyalty particularly comes to mind.[106] Accountability, after all, is the glue that holds the institution of the trust together.[107] Under the UTC, a "contest" is "an action to invalidate all or part of the terms of the trust or of property transfers to the trustee."[108] Thus, a beneficiary who in good faith brings a complaint for instructions or declaratory judgment merely to clarify the terms of the trust probably has little to worry about.[5] But the complaint should not directly or indirectly suggest any particular ordering of the equitable interests.[6] Nor should the beneficiary appeal whatever decision the trial court ultimately hands down, particularly if the appeal could result in a diminution of the size or scope of someone's equitable interest

[103]Malcolm A. Moore, *The Joseph Trachtman Lecture—The Origin of Our Species: Trust and Estate Lawyers and How They Grew*, 32 ACTEC L.J. 159, 160 (2006).

[104]*See, e.g.*, Ackerman v. Genevieve Ackerman Family Trust, 908 A.2d 1200 (D.C. 2006) (no-contest clause enforced after beneficiary brought an unsuccessful action to exclude a certain residence from the trust estate, though both the beneficiary *and the settlor* had testified that the settlor had never intended that the residence be the subject of a trust). *Cf.* Claudia G. Catalano, *What constitutes contest or attempt to defeat will within provision thereof forfeiting share of contesting beneficiary*, 3 A.L.R. 5th 590 §11 (noting that an appeal of an order admitting or denying a will to probate could itself constitute the type of contest contemplated by the will's no-contest clause).

[105]*See* Restatement (Third) of Property (Wills and Other Donative Transfers) §8.5 cmt. a (suggesting that a clause that purports to prohibit beneficiaries from enforcing fiduciary duties owed to the beneficiaries by the trustee is unenforceable). *See, e.g.*, Callaway v. Willard, 739 S.E.2d 533 (Ga. Ct. App. 2013) ("Further, our Supreme Court has held that, as a matter of public policy, *in terrorem* clauses may not be construed so as to immunize a fiduciary from the law that imposes certain duties upon and otherwise governs the actions of such fiduciaries."); Conte v. Conte, 56 S.W.3d 830 (Tex. App. 2001) (an action to remove trustee not being an effort to vary the settlor's intent, *in terrorem* clause not triggered when beneficiary commenced action to remove cotrustee); Boles v. Lanham, 865 N.Y.S.2d 360 (App. Div. 2008) (trust "incontestability" clause held not to have been triggered against a beneficiary when the beneficiary brought suit against the trustee for breach of fiduciary duty, the trustee having acted in bad faith in failing to make income and principal distributions to the beneficiary). *But see* Estate of Pittman, 63 Cal. App. 4th 290, 73 Cal. Rptr. 2d 622 (1998) (holding that beneficiaries' attempt to use legal proceedings to obtain a determination/clarification as to the legal character of property in a joint trust, *i.e.*, whether it was community or separate property, constituted a "contest" within meaning of broadly worded *in terrorem* clause).

[106]*See, e.g.*, Duncan v. Rawls, 345 Ga. App. 345 (2018).

[107]*See generally* §6.1.5 of this handbook (duty to account to the beneficiary).

[108]UTC §604 cmt.

[5] *See, e.g.*, In re Estate of Bryant, No. 07-18-00429-CV, 2020 Tex. App. LEXIS 2131 (Tex. App.—Amarillo March 11, 2020, no pet. history) ("Nor do we construe the in terrorem clause as prohibiting a suit seeking to construe terms of the trust, because such a suit affirms the validity of the trust.").

[6] *See, e.g.*, In re Estate of Johnson, 834 S.E.2d 283 (Ga. Ct. App. 2019) ("In other words, although they couch their claims as if they were not trying to break the father's will and trust, the outcome they seek is precisely that.")

under the trust.[109] One court has held that merely a complaint to convert a trust into a unitrust would trigger a forfeiture under the trust's no-contest clause.[110] Even a complaint to eliminate a trust's administrative term via decanting would be risky in the face of a no-contest clause. [7]

Also, *the trustee* should think twice before challenging a judicial ruling that a no-contest clause has been violated by some but not all beneficiaries. In a New Hampshire case involving a trustee who had attempted to do just that, the court concluded that the trustee lacked the requisite standing to pursue the appeal.[111] The court mused that the trustee might have been in violation of the duty of loyalty, specifically the derivative duty of impartiality, in appealing the clause's enforcement.[112] Invoking the exception to the American rule, a topic we take up in §8.15.13 of the handbook, the court upheld the ruling of the trial court that the trustee must personally bear the burden of the legal fees of the innocent beneficiaries who had mounted a defense to the ill-fated contest.[113] The trustee's removal from office was also upheld.[114] The equitable relief of trustee removal is taken up in §7.2.3.6 of this handbook.

A complaint to reform the provision of a trust may or may not constitute a contest. It ought not to if the purpose is, say, to remedy a scrivener error so as to effectuate settlor intent.[115] If, on the other hand, the purpose of the litigation is directly or indirectly to frustrate settlor intent then we may well have a "contest" on our hands.[116] Equity looks to the intent rather than the form.[117]

Advance-determination statutes in the no-contest context. Some states have safe-harbor statutes that enable a prospective contestant to seek an advance determination from the court as to whether a contemplated action would trigger a forfeiture of his or her equitable interest under the trust's no contest clause, assuming the trust has one.[118] In the absence of such a statute, a court might be persuaded to render an advance determination in the context of a complaint for declaratory judgment.[119]

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[109]*See, e.g.*, Smithsonian Institution v. Meech, 169 U.S. 398 (1898). *See generally* Claudia G. Catalano, *What constitutes contest or attempt to defeat will within provision thereof forfeiting share of contesting beneficiary*, 3 A.L.R.5th 590 §11 (Appeal of order admitting or denying will to probate).

[110]McKenzie v. Vanderpool, 151 Cal. App. 4th 1442, 61 Cal. Rptr. 3d 129 (2007). *See generally* §6.2.2.4 of this handbook (the noncharitable unitrust and the investment considerations).

[7] *See, e.g.*, Gowdy v. Cook, 2020 WY 3 (2020) (beneficiary's petition to decant so as to eliminate a term in the proposed-to-be-decanted trust that any corporate trustee serving thereunder shall have assets or insurance coverage of at least one hundred million dollars alone held sufficient to trigger the trust's no-contest clause, this even though decanting in any case is the prerogative of trustees, not beneficiaries).

[111]*See* Shelton v. Tamposi, 164 N.H. 490, 499, 62 A.3d 741, 749 (2013).

[112]*See Shelton*, 164 N.H. 490, 500, 62 A.3d 741, 750. *See generally* §6.2.5 of this handbook (the trustee's duty of impartiality).

[113]*See Shelton*, 164 N.H. 490, 503, 62 A.3d 741, 752.

[114]*See Shelton*, 164 N.H. 490, 505, 62 A.3d 741, 754.

[115]*See* Giammarrusco v. Simon, 91 Cal. Rptr. 3d 50 (Ct. App. 2009).

[116]*See* Giammarrusco v. Simon, 91 Cal. Rptr. 3d 50 (Ct. App. 2009).

[117]Philip H. Pettit, Equity and the Law of Trusts 27 (12th ed. 2012). *See generally* §8.12 of this handbook (equity's maxims).

[118]California at one time by statute had made it possible for a trust beneficiary with impunity to indirectly challenge a no-contest clause in the governing instrument via a safe harbor declaratory relief proceeding. *See* Donkin v. Donkin, 314 P.3d 780, 787–789 (Cal. 2013).

[119]*See generally* §8.42 of this handbook for a discussion of the difference between a complaint (petition) for instructions and a complaint (petition) for declaratory judgment. For an example of a declaratory judgment action that did not lead to forfeiture, see *In re* Miller Osborne Perry Trust, 299 Mich. App. 525, 831 N.W.2d 251 (2013) (the plaintiff-trust beneficiary's seeking a determination via a naked action for declaratory judgment as to whether he would have probable cause to contest an amendment to the governing trust instrument altering the trust's dispositive provisions and adding a no-

Probable cause. The probable-cause exception has been around since time immemorial: "When legacies are given to persons upon conditions not to dispute the validity of, or the dispositions in wills or testaments, the conditions are not in general obligatory, but only *in terrorem*. If, therefore, there exist *probabilis causa litigandi*, the non-observance of the conditions will not be forfeitures."[8] Under the Restatement (Third) of Property, a no-contest clause is enforceable unless there was probable cause for instituting the proceeding.[120] "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."[121] The Restatement (Second) of Property had a similar definition of probable cause.[122] The Restatement (Third) obliquely endorses the probable-cause enforceability exception.[123] For the public policy arguments in support of there being such an exception see the dissent in *Duncan v. Rawls*.[124]

Equitable unenforceability. Under the Restatement (Third) of Trusts, a no-contest clause is not *per se* unenforceable. It would, however, be unenforceable "to the extent that...[enforcing it]...would interfere with the enforcement or proper administration of the trust."[125] In the face of a no-contest clause could a beneficiary's mid-course contest of the generosity of the trust's fiduciary-compensation provision, say, via an action for modification, trigger a forfeiture of the beneficiary's equitable property interest? At least one court has held that in accordance with general principles of equity and as a matter of public policy commencing such an action would not.[126] Trustee compensation is taken up generally in §8.4 of this handbook.

The pre-acceptance commitment-not-to-contest provision: the tax considerations. What about a provision in a QTIP trust that subjects the surviving spouse's interest under the trust to the condition that he or she elect within six months of the settlor's death not to contest the trust. Would the presence of such a limited pre-acceptance no-contest clause jeopardize the QTIP election and the estate tax marital deduction?[127] Probably not. In the eyes of the IRS, that type of no-contest provision merely creates "alternatives" for the spouse; it does not create a "power to appoint" to persons other than the surviving spouse during the surviving spouse's lifetime, a power that would be fatal for marital deduction eligibility purposes.[128]

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contest clause held not to constitute the type of contest the particular clause was meant to deter, this though the court had found that probable cause to contest would have been lacking). *See also* Hunter v. Hunter, Trustee, 838 S.E.2d 721 (Va. 2020) (voiding trial court's order forfeiting the equitable interest of plaintiff in declaratory-judgment action).

[8] Smithsonian Institution v. Meech, 169 U.S. 398 (1898).

[120]Restatement (Third) of Property (Wills and Other Donative Transfers) §8.5. *See, e.g.*, Russell v. Wachovia Bank, N.A., 370 S.C. 5, 633 S.E.2d 722 (2006) (the court holding a trust no-contest clause enforceable against certain beneficiaries when there had been no probable cause for them to contest the trust's validity, it being self-evident that the settlor had not been the subject of undue influence). *Cf.* UPC §3-905 (providing that a will no-contest clause is unenforceable if probable cause exists for instituting proceedings).

[121]Restatement (Third) of Property (Wills and Other Donative Transfers) §8.5 cmt. c. *See, e.g.*, In re Estate of Barger, 931 N.W.2d 660 (Neb. 2019).

[122]*See* Hamel v. Hamel, 299 P.3d 278, 289–290 (Kan. 2013) (parsing Restatement (Second) of Property (Wills and Other Donative Transfers) §9.1, cmt. j).

[123]Restatement (Third) of Trusts §96 cmt. e.

[124]Duncan v. Rawls, 345 Ga. App. 345 (2018).

[125]Restatement (Third) of Trusts §96(2).

[126]*See* Heathman v. Lizer, No. B263943, 2016 Cal. App. Unpub. LEXIS 5079 (Cal. Ct. App. July 8, 2016) (unpublished).

[127]*See generally* §8.9.1.3 of this handbook (the marital deduction).

[128]Priv. Ltr. Rul. 9244020.

Beneficiary status conditioned on foregoing one's spousal-election rights. A trust no-contest provision, by statute, is generally unenforceable in Florida.[129] On the other hand, a trust provision granting the settlor's surviving spouse trust-beneficiary status, provided he or she refrains from exercising his or her spousal election rights, would be enforceable in Florida.[130] "...[A]n optional alternative to a statutory minimum benefit...is unlike a no contest clause due to the different purposes behind the legal right that the beneficiary must forfeit under each type of clause."[131]

Can the toothpaste be put back in the tube once a contest has been commenced? Assume a trust beneficiary's litigation counsel has negligently commenced a contest in the face of a fully enforceable *in terrorem* clause. Can he or she get the horse back into the barn by withdrawing the suit? Or is it too late? It is probably too late. The California court explains:

> Respondent contends, applying the familiar rule of strict construction where forfeiture is involved, that "contest" here means a legal opposition, pressed home to a decision, and that nothing short of this fulfills the terms of the condition subsequent. But having regard, as we must, to the controlling consideration of the purpose of the testator, can this be true? If so, then the testator contemplated permission to any disaffected heir, devisee, or legatee to use all of the machinery of the law to overthrow his wishes; to urge upon the court any of the "technical rules" which it may be thought were trespassed upon; to drag into publicity matters of the testator's private life; to assail his sanity—all to thwart "the testator's manifest purpose." And, after having done all this, if before a judicial determination has been actually rendered he has been able to force a compromise through the fears of the other beneficiaries under the will, or, failing this, has reached the conclusion that his efforts for the destruction of the instrument will prove abortive, he may dismiss his petition, receive the benefit of the testator's bounty, and be heard to declare, "I have not contested." This cannot be.[132]

The Restatement (Third) of Property (Wills and Other Donative Transfers) would seem in accord with the thinking of the California court: "In the absence of specific language to the contrary, the clause should be construed to be violated regardless of whether the action is subsequently withdrawn immediately after its institution, prior to a hearing, at the trial, or at any time thereafter."[133] Efforts short of filing an action that are aimed solely at procuring time to gather the facts, however, ought not to spring the *in terrorem* trap.[134]

Pour-over will contests. Assume the terms of a revocable inter vivos trust include an *in terrorem* provision; for whatever reason, a companion *in terrorem* provision is lacking in the settlor's pour-over will.[135] Could the trust's *in terrorem* clause be triggered by a will contest, the theory being that the will and will substitute (the revocable inter vivos trust) are parts of a single estate plan?[136] Probably not, and it should

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[129]Dinkins v. Dinkins, 120 So. 3d 601, 603 (Fla. 2013).

[130]Dinkins v. Dinkins, 120 So. 3d 601 (Fla. 2013).

[131]"The purpose of statutory minimum benefits is generally to ensure that surviving family members are provided for and do not become dependent on the public treasury, regardless of the decedent's intent...This purpose is not thwarted by providing an optional alternative devise [sic], because the beneficiary is free to reject it for any reason, including that it is less valuable than the statutory benefit." Dinkins v. Dinkins, 120 So. 3d 601, 603 (Fla. 2013).

[132]*In re* Hite's Estate, 101 P. 443, 445 (Cal. 1909).

[133]Restatement (Third) of Property (Wills and Other Donative Transfers) §8.5 cmt. d.

[134]Restatement (Third) of Property (Wills and Other Donative Transfers) §8.5 cmt. d.

[135]*See generally* §2.1.1 of this handbook (testamentary pour-overs to inter vivos trusts).

[136]*See generally* Chapter 1 of this handbook (unifying the law of probate and nonprobate transfers).

be no surprise that at least two courts have so held.[137] Because equity does not favor forfeitures, courts are inclined to construe i*n terrorem* clauses narrowly.[138]

Does a no-contest clause negate standing? The mere presence of an enforceable *in terrorem* clause in a trust ought not to negate a beneficiary's standing to invoke the jurisdiction of the court, provided that the beneficiary's allegations of injury, causation, and "redressability" are sufficiently particularized. At least one court has so held.[139] While the presence of an enforceable *in terrorem* clause in a trust may ultimately turn out to be an effective defense to an action brought by a beneficiary to, say, reform the trust, the mere existence of such a clause cannot deprive the beneficiary of standing to bring the action in the first place.[140] Otherwise such clauses would be self-executing.[141]

The intersection of no-contest doctrine and anti-SLAPP. Can seeking to have a no-contest clause enforced violate the jurisdiction's anti-SLAPP statute, SLAPP being an acronym for Strategic Lawsuit Against Public Participation? Yes, unless there is probable cause to seek the clause's enforcement, at least one court has so held.[142]

The trustee-beneficiary of a trust with a no-contest (in terrorem) provision is in breach of trust: Should his equitable interest now be forfeited? Assume the trustee of trust with a typical no-contest clause is also a beneficiary. Should a breach of trust on the part of the trustee-beneficiary qualify as a "contest" warranting enforcement of the clause's forfeiture provisions against the trustee-beneficiary? Probably not, and at least one court has so held: "Imposing a no-contest cause on a trustee-beneficiary for actions taken in a fiduciary capacity would not disincentivize litigation or minimize disputes among beneficiaries. Rather, it would seem to incentivize challenges by the beneficiaries to the trustee-beneficiaries'[sic] administration of the trusts in order to eliminate a trustee-beneficiary and increase the challenger's share."[143] Of course, even in the absence of such public-policy considerations, much will depend upon the specific language of the particular no-contest clause.

A trust "in terrorem" clause moonlights as an equitable remedy. We thought *in terrorem* clauses were just about litigation deterrence. Now comes *Key v. Tyler*,[144] in which an *in terrorem* clause is being potentially deployed to sanction the defendant, not the beneficiary who initiated the action. The decedent was the settlor of a revocable inter vivos trust whose provisions started out treating the settlor's three daughters equally (the sisters). One sister, a lawyer, unduly influenced the settlor to substantially reduce, via amendment, another sister's equitable interest. The trust instrument contained an *in terrorem* clause. After the settlor died, the disadvantaged sister judicially contested the amendment. The lawyer-sister, as beneficiary, judicially defended the amendment, but to no avail. The appellate court determined that the lawyer-sister's judicial defense of the amendment was potentially a clause-triggering "contest." One wonders whether the cleaner and less risky way to "punish" the lawyer-sister would have been to leave the *in terrorem* clause in its doctrinal box and instead bring/entertain either an action at law against her (e.g., for tortious interference with an expectancy) or an action in equity (e.g., for unjust enrichment), or both. Unjust-enrichment doctrine is taken up generally in §8.15.78 of this handbook.

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[137]*See* Savage v. Oliszczak, 77 Mass. App. Ct. 145, 928 N.E.2d 995 (2010); Keener v. Keener, 278 Va. 435, 682 S.E.2d 545 (2009).

[138]Bogert §181. *See, e.g.*, Sandstead-Corona v. Sandstead, 415 P.3d 310 (Colo. 2018).

[139]Sonntag v. Ward, 253 P.3d 1120, 1121 (Utah. Ct. App. 2011).

[140]Sonntag v. Ward, 253 P.3d 1120, 1121 (Utah. Ct. App. 2011).

[141]*See, e.g.*, Ard. v. Hudson, No. 02-13-00198-CV, 2015 WL 4967045 (Tex. Ct. App. Aug. 20, 2015) (holding that the mere existence of a will/trust forfeiture clause did not deprive beneficiary of standing to bring breach-of-fiduciary-duty action).

[142]*See* Urick v. Urick, 15 Cal. App. 5th 1182 (2017).

[143]*In re* W.N. Connell & Marjorie T. Connell Living Trust, 426 P.3d 599 (Nev. 2018).

[144]Key v. Tyler, 34 Cal. App. 5th 505, 246 Cal. Rptr. 3d 224 (2019).

The in personam action as a possible end-run around the trust in terrorem clause. Assume your late father's revocable inter vivos trust contains an *in terrorem* clause. Your step-mother unduly influenced/fraudulently induced him to write you out of his estate plan via trust amendment. You conclude an *in rem* direct contest of amendment is too risky. What about an action that would not disturb the governing trust documentation, such as an equitable *in personam* action against the step-mother for unjust enrichment or an *in personam* action at law against step-mother for tortious interference with a gift expectancy.[145] Should *in terrorem* clauses as a matter of public policy be enforceable even against those who would seek to be made whole via the action *in personam*? Or to put it more starkly, is the facilitation of fraudulent activity a price worth paying for litigation-deterrence? We suggest it isn't.

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[145] *Cf.* Allen v. Hall, 328 Or. 276, 974 P.2d 199 (1999) ("A tort claim does not become a will contest simply because it arises out of facts relating to the making or unmaking of a will.").