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Forfeiting Trust

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FORFEITING TRUST

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ABSTRACT

Over the past two years, a significant number of appellate courts in jurisdictions throughout the country have faced trust provisions that purport to disinherit any beneficiaries who challenge a trustee's decision making. Such provisions to "secure compliance ... with dispositions of property"—known as "forfeiture," "no-contest," "anti-contest," or "penalty" clauses—have appeared in wills for well more than a century. But the trust clauses differ from their testamentary counterparts and thus deserve serious scrutiny in their own right, especially because the abundance of recent cases has led to increasingly inconsistent and haphazard approaches. This Article exposes the problems that trust forfeiture clauses pose, in comparison to will forfeiture clauses, and proposes some solutions.

Trusts, rather than wills, have become the primary vehicle for property owners to distribute their valuables at death. Courts and legislatures profess to treat trust and will forfeiture clauses identically, but doing so has resulted in significant confusion because this approach ignores that the two donative vehicles, and the most common challenges to them, differ in fundamental ways. Indeed, wills are most frequently contested by beneficiaries who claim the document itself is invalid, either because it was executed without the requisite formalities or because the testator lacked capacity, was induced to sign the instrument against her free will, or revoked it in favor of some alternative disposition. Typical testamentary forfeiture

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clauses seeking to prevent these types of claims therefore provide that anyone who challenges the will forfeits any interests received under it; if the contestant is successful, the court invalidates both the will and the forfeiture clause. In contrast, the majority of trust litigation arises from disagreements between the beneficiaries and the trustees over how the latter invest, manage, and distribute property. Seeking to incentivize beneficiaries to go along with trustee decision making, some settlors and their advisors have purposely broadened the scope of forfeiture clauses so that they apply not only to contests that challenge the validity of the trust agreement but also to claims of fiduciary misconduct or mismanagement. But a provision that discourages breach of duty claims against trustees by dictating that anyone who files such a claim forfeits her beneficial interest allows fiduciaries to escape oversight, thereby forfeiting the very qualities that define trust law in the first place.

This Article exposes the conflicting ways that courts and legislatures have been grappling with these clauses that pit settlor intent not against a general distaste for forfeiture, but instead against fiduciary accountability. After examining the roots of this confusion, the Article proposes a more coherent approach to trust forfeiture clauses that recognizes property owners' interests in facilitating smooth relationships between their trustees and beneficiaries without forfeiting the precious oversight that allows trusts and the parties to a trust relationship to function properly.

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"Experience has shown that often, after the death of a [property owner] ... contests are commenced wherein not infrequently are brought to light matters of private life that ought never to be made public, and in respect to which the voice of the [property owner] cannot be heard either in explanation or denial; and, as a result, the manifest intention of the [property owner] is thwarted. It is not strange, in view of this, that [property owners] have desired to secure compliance with their dispositions of property, and have sought to incorporate provisions which should operate most powerfully to accomplish that result."[1]

INTRODUCTION

Imagine a mother who has three adult children, two of whom she sees regularly to celebrate daily triumphs and periodic disappointments and one of whom has moved far away and maintains only erratic contact with the family. These significantly different relationships may prompt the mother to bequeath her property to the three children in unequal shares. Whether the mother's decision is whimsical or justified is legally unimportant,[2] because a person's ability to dictate how and to whom her property flows at death is "[t]he dominant substantive principle of the law of gratuitous transfers."[3] This ability is also the source of significant personal disarray that may result when loved ones feel slighted. Indeed, of all the legacies that a property owner can leave behind, the most valuable is not her ancestral home, unfinished manuscript, or diamond jewelry, but rather a smooth and harmonious transition of ownership, without resentment, challenge, or contest.[4] It is therefore not surprising that most United States jurisdictions respect a decedent's

1. Smithsonian Inst. v. Meech, 169 U.S. 398, 415 (1898).

2. *See* Harry Hibschman, *Whimsies of Will-Makers*, 66 U.S. L. REV. 362, 362-69 (1932) (providing examples of whimsical wills); Adam J. Hirsch, *Freedom of Testation/Freedom of Contract*, 95 MINN. L. REV. 2180, 2219 (2011) ("In choosing beneficiaries, at least, a testator can make an estate plan 'as eccentric, as injudicious, or as unjust as caprice, frivolity, [or] revenge can dictate.'") (citations omitted).

3. John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105, 1109 (2004).

4. Olin L. Browder, Jr., *Testamentary Conditions Against Contest*, 36 MICH. L. REV. 1066, 1066 (1938) ("It is the natural desire of any testator that his will be speedily probated after his death and that there be no rancorous bickerings over his estate by his beneficiaries.").

written direction that any beneficiary who "contests" that decedent's will forfeits the right to inherit under it.[5] Such provisions to "secure compliance with ... dispositions of property"—known as "forfeiture," "no-contest," "anti-contest," or "penalty" clauses—have appeared in wills for well more than a century, as the 1898 Supreme Court case quoted above indicates.[6] By coupling such a clause with a gift of some significance, a property owner can incentivize a disgruntled beneficiary to accept what she has received and walk away, thereby serving the "compelling"[7] goals of preventing litigation, maintaining privacy, and encouraging family harmony.[8]

Over the past two years, a significant number of appellate courts in jurisdictions throughout the country have confronted forfeiture clauses in trusts rather than in wills.[9] But because trust forfeiture

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5. Martin D. Begleiter, *Anti-Contest Clauses: When You Care Enough to Send the Final Threat*, 26 ARIZ. ST. L.J. 629, 630 (1994); Gerry W. Beyer et al., *The Fine Art of Intimidating Disgruntled Beneficiaries with* In Terrorem *Clauses*, 51 SMU L. REV. 225, 227-28 (1998); *see also* UNIF. PROBATE CODE §§ 2-517, 3-905 (UNIF. LAW COMM'N 2010) ("Penalty Clause for Contest"); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.5 (AM. LAW INST. 2003); JACK CHALLIS & HOWARD M. ZARITSKY, STATE LAWS: NO-CONTEST CLAUSES (2012), http://www.actec.org/public/Documents/Studies/State_Laws_No_Contest_Clauses_-_Chart.pdf [http://perma.cc/6ZV5-WZFQ] [hereinafter *ACTEC Survey*]. For examples of court definitions of forfeiture clauses, see McGrath v. Gallant, 69 A.3d 968, 971 n.1 (Conn. App. Ct. 2013); Missouri *ex rel*. Bank of Am. N.A. v. Kanatzar, 413 S.W.3d 22, 24 n.2 (Mo. Ct. App. 2013).

6. *Meech*, 169 U.S. at 398; *see also* Begleiter, *supra* note 5, at 629 (testamentary no-contest clauses litigated as early as 1674); Beyer et al., *supra* note 5, at 230-42 (describing history of forfeiture clauses from Ancient Babylonia through the Supreme Court's pronouncement in *Meech*); Jack Leavitt, *Scope and Effectiveness of No-Contest Clauses in Last Wills and Testaments*, 15 HASTINGS L.J. 45, 47 (1963) (similarly noting the litigation of no-contest clauses as early as 1674). Although the term "*in terrorem* clause" also applies to no-contest clauses, this type of clause had a slightly different function historically. *See* Begleiter, *supra* note 5, at 649-50; Browder, *supra* note 4, at 1092-1102; Leavitt, *supra*, at 48-49.

7. Keener v. Keener, 682 S.E.2d 545, 548 (Va. 2009).

8. *See* Begleiter, *supra* note 5, at 631-36; *see also* Frances H. Foster, *Trust Privacy*, 93 CORNELL L. REV. 555, 572-73, 572 n.113 (2008) (describing privacy advantages that result from discouraging challenges to estates); Hirsch, *supra* note 2, at 2208 ("The [forfeiture] clause discourages costly litigation that the state traditionally subsidizes and that 'engenders animosities and arouses hostilities among the kinfolk of the testator, which may never be put to rest and which contribute to general unhappiness.'" (quoting Rudd v. Searles, 160 N.E. 882, 886 (Mass. 1928))).

9. *See, e.g.*, *In re* Shaheen Tr., 341 P.3d 1169, 1170 (Ariz. Ct. App. 2015); Peterson v. Peck, 430 S.W.3d 797, 802 (Ark. Ct. App. 2013); Donkin v. Donkin, 314 P.3d 780, 790-98 (Cal. 2013); Callaway v. Willard, 739 S.E.2d 533, 535 (Ga. Ct. App. 2013); Hamel v. Hamel, 299 P.3d 278, 288 (Kan. 2013); *In re* Estate of Stan, 839 N.W.2d 498, 500 (Mich. Ct. App. 2013); Rouner v. Wise, 446 S.W.3d 242, 260 (Mo. 2014); *In re* Joseph L. Dugan Revocable Living Tr.,

clauses purport to disinherit beneficiaries who challenge trustee decision making, they differ significantly from their testamentary counterparts and thus deserve serious scrutiny in their own right. To date, however, this case law trend has gone virtually unnoticed,[10] leading to an increasingly inconsistent and haphazard approach in the courts. This inconsistency results because each of the jurisdictions to confront the analytic underpinnings of a trust forfeiture clause has searched for guidance linearly, looking back to its law on testamentary forfeiture clauses, rather than more comprehensively. The purpose of this Article is to expose the problems that trust forfeiture clauses present, in comparison to will forfeiture clauses, and to propose some solutions.

No. 60263, 2014 WL 549697, at *1 (Nev. Feb. 10, 2014); Shelton v. Tamposi, 62 A.3d 741, 746 (N.H. 2013); Frakes v. Nay, 295 P.3d 94, 100 (Or. 2013); Wilson v. Dallas, 743 S.E.2d 746, 761 (S.C. 2013); *see also* TENN. CODE ANN. § 35-15-1014 (West 2013) (codifying provisions for enforcing no-contest clauses in trust proceedings).

10. Over the years, inheritance scholars have discussed and analyzed the treatment of *testamentary* forfeiture clauses at some length. *See* Begleiter, *supra* note 5, at 631; Beyer et al., *supra* note 5, at 225-27. For older articles, see generally Olin L. Browder, Jr., *Testamentary Conditions Against Contest Re-Examined*, 49 COLUM. L. REV. 320 (1949) [hereinafter Browder, *Re-Examined*]; Browder, *supra* note 4; Edwin C. Goddard, *Forfeiture Conditions in Wills as Penalty for Contesting Probate*, 81 U. PA. L. REV. 267 (1933); Leavitt, *supra* note 6. For more recent discussions of no-contest clauses, and specifically how their inconsistent treatment reveals shortcomings with trust doctrine, see Hirsch, *supra* note 2, at 2207-13; David Horton, *Unconscionability in the Law of Trusts*, 84 NOTRE DAME L. REV. 1675, 1732-34 (2009); Lela P. Love & Stewart E. Sterk, *Leaving More than Money: Mediation Clauses in Estate Planning Documents*, 65 WASH. & LEE L. REV. 539, 563-71 (2008). The only article that directly addresses how trust forfeiture clauses function is almost two decades old and does not address the fiduciary issues discussed in this Article. *See* Jo Ann Engelhardt, *In Terrorem Inter Vivos: Terra Incognita*, 26 REAL PROP. PROB. & TR. J. 535, 537-38 (1991). The existing literature, however, also addresses a handful of older cases (*In re* Andrus' Will, 281 N.Y.S. 831 (Sur. Ct. 1935), and *In re* Sand's Estate, 66 Pa. D. & C. 551 (Pa. Orphans' Ct., 1948)) involving forfeiture clauses that were broad enough to bar challenges to fiduciary conduct. *See* Beyer et al., *supra* note 5, at 244 (discussing *Andrus* and *Sand* as cases involving overbroad forfeiture clauses); Horton, *supra*, at 1733 (citing *Andrus* as an example of a case in which a bright-line public policy proscription could work to nullify no-contest clauses that apply to breach of trust allegations); Leavitt, *supra* note 6, at 56 (discussing *Andrus* and *Sand* as cases involving "invalid" forfeiture clauses).

Trusts,[11] rather than wills, have become the primary vehicle for property owners—known as settlors—to distribute their valuables at death.[12] Although courts and legislatures profess to treat trust and will forfeiture clauses identically,[13] doing so has resulted in significant confusion because this approach ignores that the two donative vehicles, and the most common challenges to them, differ in fundamental ways.[14] Wills are most frequently contested by beneficiaries who claim the document itself is invalid, either because the testator executed it without the requisite formalities, lacked the required capacity, was induced to sign the instrument against her free will, or revoked it in favor of some alternative disposition.[15] Typical testamentary forfeiture clauses seeking to prevent these types of claims therefore provide that anyone who challenges the

11. Trusts provide a custodial and management mechanism by which one party, known as the settlor (or grantor, donor, or creator), empowers another, known as the trustee, to hold, administer, and distribute property for the benefit of one or more beneficiaries. *See* Jeffrey A. Cooper, *Empty Promises: Settlor's Intent, the Uniform Trust Code, and the Future of Trust Investment Law*, 88 B.U. L. REV. 1165, 1166 n.1 (2008). Although there are many different types of trusts, including charitable and business trusts, this Article focuses on the private donative trust. *See* John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 630-31 (1995).

12. JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 385 (9th ed. 2013); John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1108 (1984).

13. *See* Ackerman v. Genevieve Ackerman Family Tr., 908 A.2d 1200, 1203 (D.C. 2006); *Hamel*, 299 P.3d at 288; Keener v. Keener, 682 S.E.2d 545, 548 (Va. 2009); GEORGE GLEASON BOGERT ET AL., THE LAW OF TRUSTS AND TRUSTEES § 181, at 248 n.5 (2d ed. 1979); *see also* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.5 cmt. i (AM. LAW INST. 2003) ("With the increase in the use of revocable inter vivos trusts as will substitutes, no-contest clauses ... restraining challenges of particular provisions in those trusts serve the same purpose as do such clauses in wills, and the same test applies to determine the validity of those clauses in the two comparable situations."); Engelhardt, *supra* note 10, at 560-61 (describing how the few decided cases to discuss forfeiture clauses in trusts "support the proposition that courts will construe an *in terrorem* clause the same in a will as in a trust" and that "[c]ommentators have reached the same conclusion"); Joyce Moore, *Will Contests from Start to Finish*, 44 ST. MARY'S L.J. 97, 122-23 (2012) (describing how the "scant" jurisdictions to address no-contest clauses in trusts appeared to treat them "similar to no-contest clauses found in wills"). *But see, e.g.*, *In re* Griffin Revocable Grantor Tr., 765 N.W.2d 613, 613 (Mich. 2009) (reversing appellate court to hold that a statute's probable cause standard applicable to will forfeiture clauses did not apply to trust forfeiture clauses).

14. *See infra* notes 111-23 and accompanying text.

15. RESTATEMENT (THIRD) OF TRUSTS § 96 cmt. a (AM. LAW INST., Tentative Draft No. 5, 2009); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.5 (AM. LAW INST. 2003); Browder, *Re-Examined*, *supra* note 10, at 328.

will forfeits any interests received under it; if the contestant is successful, the will (including the clause) is invalidated.[16]

Perhaps because most trusts last for far longer than the administration of most estates,[17] the majority of trust litigation—and there is plenty—arises from disagreements between the beneficiaries and the trustees over how the trustees invest, manage, and distribute the property rather than from qualms with the trust agreement's initial validity.[18] Seeking to incentivize beneficiaries to go along with trustee decision making, some settlors and their advisors have purposely broadened the scope of forfeiture clauses so that they apply not only to contests that challenge the validity of the trust agreement but also to claims of fiduciary misconduct or mismanagement.[19] But a provision that discourages breach of duty claims against trustees by dictating that anyone who files such a claim will forfeit her beneficial interest allows fiduciaries to escape oversight, thereby forfeiting the very qualities that define trust law in the first place.

This Article exposes the conflicting ways that courts and legislatures have been grappling with these clauses that pit settlor intent, not against a general distaste for forfeiture, but instead against fiduciary accountability, and it proposes solutions both for those who are planning trusts and for those who are interpreting them. The Article proceeds in four parts. Part I describes forfeiture clauses generally, including how they have been triggered by beneficiaries' challenges to will validity although not by requests for document

16. *See infra* Part I.A.

17. *See* LAWRENCE M. FRIEDMAN, DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW 113 (2009).

18. *See* BOGERT ET AL., *supra* note 13, §§ 541, 701, 963, 966.

19. *See, e.g.*, *In re* Shaheen Tr., 341 P.3d 1169, 1170-71 (Ariz. Ct. App. 2015); Peterson v. Peck, 430 S.W.3d 797, 802 (Ark. Ct. App. 2013); Bradley v. Gilbert, 91 Cal. Rptr. 3d 680, 682-84 (Ct. App. 2009); Callaway v. Willard, 739 S.E.2d 533, 535 (Ga. Ct. App. 2013); Hamel v. Hamel, 299 P.3d 278, 289 (Kan. 2013); *In re* Dugan Revocable Living Tr., No. 60263, 2014 WL 549697, at *1 (Nev. Feb. 10, 2014); *see also In re* Estate of Stan, 839 N.W.2d 498, 500 (Mich. Ct. App. 2013); Frakes v. Nay, 295 P.3d 94, 100 (Or. 2013); Wilson v. Dallas, 743 S.E.2d 746, 761 (S.C. 2013); *infra* notes 123-27 and accompanying text. That is not to say that the issue of fiduciary misconduct never arose before. *See* Tobias v. Korman, 141 S.W.3d 468, 477 (Mo. Ct. App. 2004) (cited in current draft provision of RESTATEMENT (THIRD) OF TRUSTS)); *infra* notes 162-65 and accompanying text (discussing a 1935 New York case rejecting a forfeiture clause that purported to be triggered by challenges to trustee decision making). However, this recent onslaught of cases is noteworthy.

clarification and construction. It then briefly surveys different jurisdictions' standards for enforcing traditional (in other words, testamentary) forfeiture clauses. Part II looks at the important role management trusts have come to play in estate planning in order to explain why forfeiture clauses are appearing in trust agreements with increasing frequency and how trusts' divided ownership and long-term duration affect those clauses.

Part III describes recent cases that have tried to negotiate the two important interests that trust forfeiture clauses put at odds—settlor intent and trustee accountability—with vastly different and mostly confusing results. This Part also describes legislative attempts to address trust forfeiture clauses, including a draft provision in the Restatement (Third) of Trusts. Part IV proposes a more coherent and balanced approach to trust forfeiture clauses, both from a forward-looking (or planning) and a backward-looking (or administrative) perspective. This Part cautions against including these provisions regularly and advocates for treating the clauses as presumptively invalid but not void. The burden-shifting approach that this Article proposes acknowledges the settlor's interest in facilitating a smooth relationship between her fiduciary and beneficiaries without forfeiting the precious oversight that allows trusts to function properly.

I. WILLS AND FORFEITURE CLAUSES

With testamentary intent as the driving force of inheritance law,[20] it is not surprising that the vast majority of jurisdictions allow a property owner to disinherit a beneficiary who chooses to contest an estate plan.[21] Many jurisdictions have cautioned that such clauses must be strictly construed[22] and have restricted the settlor's "dead

20. Begleiter, *supra* note 5, at 633; *see also infra* note 32. For citations to additional articles, cases, and texts setting forth this principle, see Deborah S. Gordon, *Reflecting on the Language of Death*, 34 SEATTLE U. L. REV. 379, 382 n.13 (2011). For an analysis of how other doctrines trump this professed priority, see Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 236 (1996).

21. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.5 (AM. LAW INST. 2003); RESTATEMENT (THIRD) OF TRUSTS § 96 cmts. (AM. LAW INST., Tentative Draft No. 5, 2009); Begleiter, *supra* note 5, at 629; Beyer et al., *supra* note 5, at 227, 242-43; Hirsch, *supra* note 2, at 2207; *see also infra* notes 45-61 and accompanying text.

22. *See infra* notes 38-44 and accompanying text.

hand" power by refusing to allow disinheritance of a beneficiary who has brought a contest in "good faith" or with "probable cause."[23] While some scholars have argued that anything short of absolute enforcement of forfeiture clauses threatens to eviscerate the purposes of such clauses altogether,[24] property owners continue to include forfeiture clauses in their testamentary documents[25] and courts continue to disinherit beneficiaries as a result of them.[26] These clauses therefore have proven to be a powerful tool for striking a balance between testators' donative freedom, including the understandable desire to discourage wasteful and vexatious litigation, and the probate system's interest in enforcing wills that are, in fact, valid.

A. Background and Purposes

Forfeiture clauses are designed to dissuade dissatisfied beneficiaries from disrupting an estate plan.[27] Although infinitely varied, a typical forfeiture clause will provide:

> If any beneficiary under this Will shall in any manner contest or attack this Will or any of its provisions, then in such event any share or interest in my estate given to such contesting beneficiary under this Will is hereby revoked and shall be disposed of in the same manner provided herein as if such contesting beneficiary had predeceased me.[28]

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23. *See infra* notes 52-61 and accompanying text.

24. Begleiter, *supra* note 5, at 679; *see also* Beyer et al., *supra* note 5, at 245-47 (describing cases treating forfeiture clauses as valid without exception); Hirsch, *supra* note 2, at 2209-10 (describing inefficiencies and hindsight bias that the probable cause rule produces).

25. *See, e.g.*, Hamm v. Hamm, 429 S.W.3d 384, 387 (Ark. Ct. App. 2013); Stewart v. Ciccaglione, No. CV074008040S, 2014 WL 1647035, at *1 n.1 (Conn. Super. Ct. Mar. 26, 2014); Ivie v. Smith, 439 S.W.3d 189, 195 (Mo. 2014) (en banc); *In re* Estate of Prevratil, 990 N.Y.S.2d 697, 703-04 (App. Div. 2014); *see also supra* note 9 (citing cases).

26. *See, e.g.*, Norton v. Norton, 744 S.E.2d 790, 791 (Ga. 2013) (affirming summary judgment disinheriting beneficiaries based on forfeiture clause); Nickles v. Spisak, No. 2013-P-0094, 2014 WL 2882429, at *5 (Ohio Ct. App. June 23, 2014) (affirming probate court's disinheritance of beneficiaries who contested will because "[n]o contest clauses in wills and other testamentary documents are ... strictly enforced").

27. Begleiter, *supra* note 5, at 633-40; Foster, *supra* note 8, at 572-73, 672 n.113.

28. Leavitt, *supra* note 6, at 45 (quoting BANK OF AM., SUGGESTED PROVISIONS FOR WILLS AND TRUSTS 21 (3d ed. 1960)); *see also, e.g.*, Norman v. Gober, 737 S.E.2d 309, 310 n.1 (Ga. 2013) ("Should any beneficiary contest or initiate legal proceedings to contest the validity of

The clauses are directed towards the most common types of will "attacks," which contest the validity of the testamentary instrument or any of its components.[29]

When a court considers whether to enforce a forfeiture clause and thereby sever the interests of a beneficiary who has filed or participated in a contest, the court often will discuss two overarching but diametrically opposed policies[30]: inheritance law's respect for testamentary freedom, and equity's distaste for forfeiture.[31] In favor of enforcing the clause and disinheriting the beneficiary is the often-repeated and well-entrenched rule that prioritizes donative intent above other concerns.[32] Because a property owner can manifest that

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this Will or any provision herein or to prevent any provision from being carried out in accordance with its terms (whether or not in good faith and with probable cause), then all the benefits provided for such contesting beneficiary, and any such beneficiary's descendants, in this Will are revoked and annulled."); *Prevratil*, 990 N.Y.S.2d at 704 (providing for revocation of any bequest to any beneficiary who "contest[s] the probate or validity of [the] Will or any provision thereof, or ... institute[s] ... any proceeding to ... prevent any provision [of the Will] from being carried out in accordance with its terms"); Begleiter, *supra* note 5, at 629 ("In the event that any provision of this my last will and testament is contested by any of the parties mentioned 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." (quoting Barry v. Am. Sec. & Tr. Co., 135 F.2d 470, 471 (D.C. Cir. 1943))).

29. RESTATEMENT (THIRD) OF TRUSTS § 96 cmt. e, reporter's notes (AM. LAW INST. 2012). A challenge to a document component, rather than to the entire document, prompts the additional question of what happens if the contestant successfully invalidates the component but the instrument (including its forfeiture clause) otherwise stands; theoretically, the mere filing of the contest might trigger forfeiture regardless of the contest's outcome. *But see* Begleiter, *supra* note 5, at 645 ("[R]arely will a contest be successful but the no-contest clause be held valid."). Of course, a carefully drafted forfeiture clause, a well-drafted statute, or even a probable cause standard can temper this drastic result. *See, e.g.*, DEL. CODE ANN. tit. 12, § 3329(b)(2) (West 2006) (providing that a no-contest clause is unenforceable if asserted on the basis of "[a]ny action in which the beneficiary is determined by the court to have prevailed substantially").

30. *See* Horton, *supra* note 10, at 1733-34 (describing how "forceful arguments lurk on both sides of the policy ledger").

31. *See, e.g.*, Peterson v. Peck, 430 S.W.3d 797, 802 (Ark. Ct. App. 2013) ("Our supreme court has recognized the validity of no-contest clauses since at least 1937.... However, because such clauses work a forfeiture, they are strictly construed.") (citations omitted); *In re* Estate of Stan, 839 N.W.2d 498, 500 (Mich. Ct. App. 2013) (finding "*in terrorem* clauses ... generally valid and enforceable" but requiring that they be "strictly construed").

32. Begleiter, *supra* note 5, at 631, 633-34 (describing "the great importance the law places on freedom of testation" and its effects on analysis of no-contest clauses); Daniel B. Kelly, *Restricting Testamentary Freedom: Ex Ante Versus Ex Post Justifications*, 82 FORDHAM L. REV. 1125, 1134 (2013) ("American succession law privileges 'donor's intention' as the 'controlling consideration' in determining the meaning of a donative document." (quoting

intent by disinheriting whomever she chooses, unless a specific statutory provision bars such dispossession,[33] she also can place a condition on a bequest, such as one that prohibits a contest, so long as the condition does not violate public policy.[34] The rationale is that conditioning the bequest is something less than complete disinheritance and gives the beneficiary a choice to accept or reject the condition (and the property).[35] Other justifications for forfeiture clauses in wills include that "upholding ... such clauses avoids wasting the testator's estate by discouraging needless litigation"[36] and that a testator "should be able to avoid having details of his private life made public when he cannot be heard in explanation."[37]

RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 (AM. LAW INST. 2003))); *see also, e.g.*, Rollins v. Rollins, 755 S.E.2d 727, 730 (Ga. 2014) ("[T]he cardinal rule in trust law is that the intention of the settlor is to be followed."); Carter v. Carter, 965 N.E.2d 1146, 1152 (Ill. App. Ct.) ("A court's primary concern in interpreting a trust instrument is to discover the intent of the grantor, which the court will effectuate if it is not contrary to law or public policy."); *In re* G.B. Van Dusen Marital Tr., 834 N.W.2d 514, 520 (Minn. Ct. App. 2013) ("A court's purpose in interpreting a trust agreement is to ascertain and give effect to the grantor's intent.") (quotations omitted); Shelton v. Tamposi, 62 A.3d 741, 746 (N.H. 2013) ("[W]hen we construe a trust instrument, 'the intention of a settlor is paramount.'" (quoting Appeal of Lowy, 156 N.H. 57, 61 (2007))); Rachal v. Reitz, 403 S.W.3d 840, 842 (Tex. 2013) ("[W]e enforce trust restrictions on the basis of the settlor's intent.").

33. The most obvious type of restriction on disinheritance is the spousal right of election. *See* Hirsch, *supra* note 2, at 2222-33.

34. Begleiter, *supra* note 5, at 631; *see also* Goddard, *supra* note 10, at 269 ("The right to give and the right to take are creatures of the law, subject to the determination of the legislature in statutes and of the courts in matters not covered by statutes but involving questions of public policy."); Ronald J. Scalise, Jr., *Public Policy and Antisocial Testators*, 32 CARDOZO L. REV. 1315, 1367 (2011) ("[A] robust theory of testation includes within it the right to condition legacies on personal, arbitrary, and sometimes ill-advised and foolish motives."); Jeffrey G. Sherman, *Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices*, 1999 U. ILL. L. REV. 1273, 1276-77 (discussing testamentary restraints); Joshua C. Tate, *Conditional Love: Incentive Trusts and the Inflexibility Problem*, 41 REAL PROP. PROB. & TR. J. 445, 453 (2006) (describing incentive trusts); *cf.* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 18.7 (8th ed. 2011) (suggesting that courts should have the power to modify testamentary conditions because the testator cannot "recontract" with a beneficiary); Hirsch, *supra* note 2, at 2244-48 (discussing Posner's thesis). For cases involving conditional bequests, see *In re* Estate of Feinberg, 919 N.E.2d 888 (Ill. 2009); Gordon v. Gordon, 124 N.E.2d 228 (Mass. 1955); *In re* Silverstein's Will, 155 N.Y.S.2d 598 (Sur. Ct. 1956); Shapira v. Union Nat'l Bank, 315 N.E. 2d 825, 826 (Ohio Ct. Com. Pl. 1974).

35. Begleiter, *supra* note 5, at 655-57 (arguing that forfeiture clauses do not actually effect forfeitures but simply condition a beneficiary's receipt of assets to which she is not entitled on the beneficiary's acquiescence to the terms of the gift).

36. *Id.* at 631; *see also* Browder, *supra* note 4, at 1073.

37. Begleiter, *supra* note 5, at 631.

On the other hand, courts construe forfeiture clauses "strictly and narrowly" based on the equally pervasive idea that "equity abhors a forfeiture."[38] Whether this phrase is, as Professor Martin Begleiter claims, a conclusory reference to a narrow and inapplicable contract doctrine[39] or, more broadly, an expression of concern that litigants receive procedural (and not just substantive) fairness,[40] it has justified a narrower view of forfeiture clauses' reach. To the extent that a beneficiary "plainly and palpably [fits] within the scope of the forfeiture clause" a court is not to quibble over or "put a strained or overtechnical construction" on the clause's language to allow that person to "escape the penalty of forfeiture" by "some hook or crook."[41] But mindful of the potentially extreme result of such a clause, which effectively deprives a beneficiary of the opportunity to claim property she believes is rightfully hers, a court will take a conservative approach in deciding whether the specific language of the clause applies to the precise "contest" that the beneficiary has mounted.[42] As Professor Jack Leavitt noted some years ago when discussing this policy of strict construction, one court, for example, even declined to enforce a forfeiture clause against a beneficiary who participated in a will contest that had been filed some months earlier because the clause stated that it applied to beneficiaries who "instituted" challenges, and the beneficiary in question simply joined an ongoing contest.[43] The rationale harkens back to donative intent: "if the testator had wished the loss of the beneficiary's

38. *Id.* at 630.

39. *Id.* at 655-56. Professor Begleiter traces the origin of this often-repeated phrase to a commercial setting where, responding to abuses of penal bonds, debtors were not penalized by forfeitures of their entire estates but rather had to pay their "true debt and damages," so long as pecuniary damages provided adequate relief. *Id.* Because the phrase originated in a narrow contractual context, Begleiter argues, it does not translate fluidly to the law of gratuitous transfers. *Id.*

40. *See, e.g.*, Horton, *supra* note 10, at 1732-33 (describing one "critical value" that no-contest clauses implicate is an individual's right to "access courts freely").

41. Leavitt, *supra* note 6, at 72 (citing *In re* Kitchen, 220 P. 301, 303 (Cal. 1923)).

42. Moore, *supra* note 13, at 118; *see also* Browder, *supra* note 4, at 1067 ("It is extremely important to bear in mind that the legality of a condition can be determined only with reference to its application, i.e., with reference to the particular facts and the grounds of contest."); Leavitt, *supra* note 6, at 46 ("Since forfeitures are disfavored by the courts, the no-contest clause is strictly construed to prevent this result whenever possible. Only if the acts of the party come strictly within the express terms of the punitive clause is the breach declared.").

43. Leavitt, *supra* note 6, at 46.

bequest to result from the conduct at issue, the testator could have drafted the will to accomplish that result."[44]

B. Enforceability of Testamentary Forfeiture Clauses: Jurisdictional Variations

These overarching policies—donative freedom but conservative construction—have led to variations for enforcement of will forfeiture clauses based on how a jurisdiction prioritizes the competing interests. Only two states—Florida and Indiana—refuse to recognize forfeiture clauses at all as a matter of public policy.[45] Georgia requires, as a prerequisite to enforcement of a forfeiture clause, that the property owner include a gift-over clause specifying what is to become of the disinherited beneficiary's share.[46]

In contrast to these restrictive approaches that limit the influence of forfeiture clauses and thus the testator's power to incentivize

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44. Begleiter, *supra* note 5, at 675 (citing *In re* Estate of Watson, 223 Cal. Rptr. 14, 17-18 (Ct. App. 1986)); *see also In re* Estate of Goyette, 66 Cal. Rptr. 103, 105 (Ct. App. 1968); Liggett v. Liggett, 108 S.W.2d 129, 132-33 (Mo. 1937); *In re* Cronin's Will, 257 N.Y.S. 496, 504 (Sur. Ct. 1932), *aff'd*, 261 N.Y.S. 936 (App. Div. 1936).

45. *See* FLA. STAT. ANN. § 732.517 (West 2014) ("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."); *id.* § 736.1108 ("A provision in a trust instrument purporting to penalize any interested person for contesting the trust instrument or instituting other proceedings relating to a trust estate or trust assets is unenforceable."); IND. CODE ANN. § 29-1-6-2 (West 2014) ("If, in any will admitted to probate in any of the courts of this state, there is a provision or provisions providing that if any beneficiary thereunder shall take any proceeding to contest such will or to prevent the admission thereof to probate, or provisions to that effect, such beneficiary shall thereby forfeit any benefit which said will made for said beneficiary, such provision or provisions shall be void and of no force or effect.").

46. GA. CODE ANN. § 53-4-68 (West 1996); Cox v. Fowler, 614 S.E.2d 59, 61 (Ga. 2005). Although New Hampshire and Mississippi appear to have had this same requirement at some point in time, *see* Pringle v. Dunkley, 22 Miss. 16 (1850); Burtman v. Butman, 85 A.2d 892, 894 (N.H. 1952), neither jurisdiction follows this approach today. *See* N.H. REV. STAT. ANN. § 564-B:10-1014 (2011); *In re* Estate of Thomas, 28 So. 3d 627, 638 (Miss. Ct. App. 2009), *cert. denied,* 27 So. 3d 404 (2010). Vermont has no law on the enforceability of no-contest clauses. *See ACTEC Survey*, *supra* note 5, at 1. Alabama has yet to decide on the standard that it applies to enforceability. Although Alabama courts have recognized the validity of forfeiture clauses, none have found a clause to apply to the specific contest in question. *See, e.g.*, Harrison v. Morrow, 977 So. 2d 457, 459 (Ala. 2007) ("We need not determine whether *in terrorem* clauses are unenforceable in Alabama when their enforceability is specifically challenged, because we conclude that the will contest did not fall within the proscriptions of the *in terrorem* provision in this case.").

harmony among her heirs and ensure compliance with her wishes,[47] a sizable minority of states enforce the clauses absolutely, so that any beneficiary who brings a "contest," as defined in the language of the instrument, will be disinherited if the will turns out to be valid and admissible.[48] These jurisdictions do not look at the beneficiary's factual basis for contesting the testamentary instrument. If the beneficiary's claims fail, she forfeits her inheritance regardless of whether she had a valid reason for complaining; if she succeeds in discrediting the will, of course, the entire document—including its forfeiture clause—will be struck down, and the property will pass either through intestacy or pursuant to the terms of an earlier instrument.[49] This approach encourages beneficiaries to think seriously about the merits of their claims before filing suit, although threat of disinheritance has less impact on beneficiaries who receive only token bequests (and therefore have less to lose).[50] The threat also may dissuade needier or risk-averse beneficiaries from suing, even if their qualms are valid.[51]

Most states take an intermediate position on will forfeiture clauses, recognizing and enforcing them unless the beneficiary who has contested the document had "probable cause" to initiate the challenge.[52] In this context, "[p]robable 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

47. *See* Beyer et al., *supra* note 5, at 227 ("Under a typical *in terrorem* provision, the beneficiary is presented with a choice of either (1) accepting the gift under the will or trust, or (2) contesting the instrument with the hope of upsetting the testator's or settlor's intended disposition and, instead, receiving a greater share of property through intestacy, under a prior will, or via some other means, but with the concomitant risk of triggering a forfeiture of all benefits if the contest fails.").

48. *Id.* at 245; *see also ACTEC Survey*, *supra* note 5, at 2 (listing District of Columbia, Kentucky, Louisiana, Missouri, New Hampshire, New York, Ohio, Rhode Island, Virginia, Washington, and Wyoming as states that enforce no-contest clauses absolutely).

49. Hirsch, *supra* note 2, at 2209.

50. *Id.* at 2211 ("[I]f a testator leaves potential contestants nothing under a will, a no-contest clause becomes toothless because would-be contestants have nothing to lose by bringing the contest.").

51. *See infra* notes 58-61 and accompanying text.

52. Beyer et al., *supra* note 5, at 247-49 (citing cases); *ACTEC Survey*, *supra* note 5, at 2, 5 (listing jurisdictions).

would be successful."[53] If the contest fails and the will is admitted to probate, a beneficiary who had adequate reason to bring the contest[54] will not be deprived of her bequest.[55] Although this compromise approach has been criticized as incurring additional costs and undermining testator intent,[56] it is the approach that both the National Conference of Commissioners on Uniform State Laws and the American Law Institute favor.[57] The primary policy justification for refusing to disinherit a beneficiary who has "probable cause" to contest a will, even if her claim ultimately does not succeed, is that the beneficiary is providing the court with knowledge that helps the court ascertain whether the will should be probated.[58] Other justifications include a reluctance to restrict the beneficiary's access to the courts and a desire to protect the interests of vulnerable beneficiaries.[59] Because the outcome of a will contest is often tremendously

53. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.5 cmt. c (AM. LAW INST. 2003); *see also, e.g.*, N.J. STAT. ANN. § 3B:3-47 (West 2014); N.M. STAT. ANN. § 45-2-517 (West 2014); 20 PA. STAT. AND CONS. STAT. ANN. § 2521 (West 2014); *In re* Estate of Shumway, 9 P.3d 1062, 1066 (Ariz. 2000); *In re* Estate of Peppler, 971 P.2d 694, 697 (Colo. App. 1998); *In re* Estate of Campbell, 876 P.2d 212, 216 (Kan. Ct. App. 1994); Hannam v. Brown, 956 P.2d 794, 799 (Nev. 1998); Winningham v. Winningham, 966 S.W.2d 48, 52-53 (Tenn. 1998). The Restatement explains that the evidence needed should be less where there is strong public policy supporting the legal ground of the contest or attack. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.5 cmt. c. (AM. LAW INST. 2003) A factor which bears on the existence of probable cause is that the beneficiary relied upon the advice of disinterested counsel sought in good faith after a full disclosure of the facts. *Id.*

54. Some jurisdictions speak of the exception applying if the contestant brought the challenge in "good faith." *See, e.g.*, Seymour v. Biehslich, 266 S.W.3d 722, 726 (Ark. 2007); *In re* Estate of Mank, 699 N.E.2d 1103, 1107-09 (Ill. App. Ct. 1998). Others require good faith *and* probable cause. NEV. REV. STAT. ANN. § 137.005(4) (West 2013); Griffin v. Sturges, 40 A.2d 758, 762-63 (Conn. 1944); *In re* Cocklin's Estate, 17 N.W.2d 129, 135 (Iowa 1945); Ryan v. Wachovia Bank & Tr. Co., 70 S.E.2d 853, 855-57 (N.C. 1952); *In re* Estate of Massey, 964 P.2d 238, 241 (Okla. Civ. App. 1998); Dutterer v. Logan, 137 S.E. 1, 1-3 (W. Va. 1927). Texas discusses the requirements in terms of both "just cause" and good faith. TEX. PROP. CODE ANN. § 112.038 (West 2013).

55. Begleiter, *supra* note 5, at 641. The Mississippi Supreme Court recently held that the probable cause standard applies even though the no-contest clause itself states that forfeiture will occur regardless of whether the beneficiary acts in good faith and with probable cause. Parker v. Benoist, No. 2012-CA-02010-SCT, 2015 WL 691300, at *1 (Miss. Feb. 19, 2015).

56. Begleiter, *supra* note 5, at 631-34; Hirsch, *supra* note 2, at 2209-10.

57. UNIF. PROBATE CODE §§ 2-517, 3-905 (UNIF. LAW COMM'N 2010); *see also* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.5 (AM. LAW INST. 2003); *see also* RESTATEMENT (SECOND) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 9.1 (AM. LAW INST. 1983).

58. Begleiter, *supra* note 5, at 641; Beyer et al., *supra* note 5, at 247-48.

59. Begleiter, *supra* note 5, at 632, 645-48.

difficult to predict, especially when a beneficiary is claiming undue influence over an elderly or infirm testator,[60] this approach uses the probable cause standard (or a variant on it) to temper the harsh result of total disinheritance while respecting the testator's interest in discouraging litigation.[61]

In addition to these general but jurisdiction-dependent approaches to traditional forfeiture clauses, there are several categories of will challenges that historically have not triggered disinheritance, regardless of whether the contestant had sufficient reason to file a lawsuit. First, any challenge to a will brought by a beneficiary in her *fiduciary* capacity typically does not result in that beneficiary losing her inheritance.[62] In other words, if a beneficiary who is also an executor seeks to discredit a provision of the will, courts have reasoned that her position as a fiduciary, rather than as a beneficiary, burdens her with the obligation to raise questions about the document's legality that do not serve the testator's purposes of discouraging litigation.[63] The fiduciary is simply doing the job assigned to her by the testator—effectuating rather than disrupting the estate plan—even if the challenge provides her with a personal benefit.[64]

Second, a proceeding to determine the meaning of provisions in a will, otherwise known as a construction proceeding, ordinarily does not trigger forfeiture.[65] The primary justification for distinguishing this type of action is that it involves beneficiaries who

60. *See* Carla Spivack, *Why the Testamentary Doctrine of Undue Influence Should Be Abolished*, 58 U. KAN. L. REV. 245, 245 (2010) ("[U]ndue influence fails to meet any standard of clarity, fairness, or predictability that a legal doctrine should satisfy."); *see also* Gordon, *supra* note 20, at 413-14 (describing competing stories that populate undue influence claims).

61. States often have a preliminary review mechanism in place—in the nature of a probable cause hearing or a "safe harbor" proceeding—to determine whether a contest, if filed, would trigger the forfeiture clause. *See* N.Y. EST. POWERS & TRUSTS LAW § 3-3.5(b)(2)(D) (McKinney 2014) (safe harbor proceeding); *In re* Miller Osborne Perry Tr., 831 N.W.2d 251, 253 (Mich. Ct. App. 2013) (describing declaratory judgment action to determine probable cause). *See generally* Donkin v. Donkin, 314 P.3d 780, 790 (Cal. 2013) (describing why California eliminated "safe harbor" proceedings).

62. Begleiter, *supra* note 5, at 668.

63. Leavitt, *supra* note 6, at 76.

64. Begleiter, *supra* note 5, at 668; Leavitt, *supra* note 6, at 76.

65. Browder, *Re-Examined*, *supra* note 10, at 321-22 (describing difficulty in distinguishing construction action from contest); Leavitt, *supra* note 6, at 73 (citing cases chronologically from 1898 to 1961 so holding).

are seeking to clarify what the testator actually meant and therefore to implement, rather than impede, the testator's intent.[66] In response to this argument, though, Professor Begleiter has pointed out that these construction actions are not "altruistic attempt[s] to ascertain ... true intention" but rather are an attempt by the beneficiaries "to create an ambiguity and to take more for themselves."[67] Nevertheless, many statutes, cases, and clauses expressly exempt "construction proceedings" from the definition of "contest."[68]

The third category that traditionally has not triggered forfeiture, and the most pertinent to this Article, involves actions by beneficiaries who are asking a court to remove an executor or to order an accounting of estate assets.[69] Because these cases frequently involve clauses, like the one quoted at the beginning of this section, that prohibit attacks to the will or any of its provisions, courts have reasoned that actions challenging some aspect of estate administration do not fall within the prohibition of "contests" to the will.[70] Where, however, the word "contest" is interpreted more liberally, courts have refused to disinherit a beneficiary who requests an accounting or criticizes an executor based on the rationale that the

66. Begleiter, *supra* note 5, at 653-54, 672-75.

67. *Id.* at 673.

68. *See, e.g.*, NEV. REV. STAT. ANN. § 137.005(3)(c) (West 2000); N.H. REV. STAT. ANN. § 551:22(III)(d) (2007); Estate of Strader, 132 Cal. Rptr. 2d 649, 655 (Ct. App. 2003) ("[A] petition seeking to interpret a will does not ordinarily violate a no contest clause."); Griffin v. Sturges, 40 A.2d 758, 760 (Conn. 1944) ("Where an action is brought to secure an interpretation of a will, an assertion by any beneficiary of the construction which he believes to be the correct one is not a contest as that expression is used in the will before us, because he is merely seeking to give effect to the real intent of the testator."); Railey v. Skaggs, 212 So. 2d 86, 87 (Fla. Dist. Ct. App. 1968) (interpreting a provision providing that the no-contest clause "shall not be construed to limit the appearance by any beneficiary as a witness in any proceeding for the probate of this will, nor limit his appearance in any capacity in a proceeding for its construction"); Va. Found. of Indep. Colls. v. Goodrich, 436 S.E.2d 418, 420 (Va. 1993) ("As a general principle, one who seeks the guidance of a court in interpreting a provision in a will is not considered to have 'contested' the will in a manner which would actuate a forfeiture clause."); *see also* Love & Sterk, *supra* note 10, at 565 ("Of course, a no contest clause could be drafted more broadly to encompass [claims concerning construction], but many testators and their lawyers would be uncomfortable with a clause so broad that it forecloses litigation over genuine and unintended ambiguities in the will.").

69. *See, e.g.*, Sinclair v. Sinclair, 670 S.E.2d 59, 61 (Ga. 2008).

70. Begleiter, *supra* note 5, at 670 (citing and summarizing cases). Some of the recent cases involving narrow forfeiture clauses that appear in trusts use this reasoning. *See* Commonwealth Bank & Tr. Co. v. Young, 361 S.W.3d 344, 353 (Ky. Ct. App. 2012); Keener v. Keener, 682 S.E.2d 545, 549 (Va. 2009).

testator could not have intended to insulate the fiduciary from her obligation to disclose what she is doing and from accountability generally.[71]

An important difference between these will cases and the trust cases that have arisen recently and are discussed in Part III below is that estate planners have expanded the breadth of the forfeiture clauses that are appearing in trust agreements,[72] thereby clarifying that the property owners *do* intend the clauses to apply to contests that question both document validity and ongoing fiduciary conduct.[73] Faced with this express language and display of intent, courts and legislatures have had to decide whether these conditions that settlors impose on beneficiaries' initial and continued right to receive property under a trust are valid when the conditions constrain, to some degree, the beneficiaries' ability to police their trustees.

II. INTER VIVOS TRUSTS AND MODERN ESTATE PLANNING

Where forfeiture clauses were once less common in trust agreements than in wills,[74] recent case law reveals settlors' rapidly increasing reliance on these clauses to deter trust beneficiaries from mounting challenges.[75] This evolution is natural and expected,

71. Begleiter, *supra* note 5, at 670 (citing Jackson v. Braden, 717 S.W.2d 206 (Ark. 1986) ("In those cases where the beneficiary alleged mismanagement or other errors in the administration of the estate, the courts have unvaryingly held that such objections do not violate the no-contest clause.")); *see also In re* Estate of Kruse, 86 Cal. Rptr. 491, 494 (Ct. App. 1970); *In re* Miller's Estate, 41 Cal. Rptr. 410, 416-18 (Dist. Ct. App. 1965); Estate of Robbins, 544 N.Y.S.2d 427, 429-30 (Sur. Ct., 1989). *But see* Browder, *Re-Examined*, *supra* note 10, at 340 (citing RESTATEMENT (FIRST) OF PROP. § 431 (AM. LAW INST. 1944) (pointing out that few early cases rejected forfeiture clauses that intermeddled with executors and that the American Law Institute had taken "the position that such a [broad] restraint" is generally "valid")).

72. *See infra* Parts II, III.

73. *But see supra* notes 10, 19 (describing several older cases and articles involving broad no-contest clauses rejected for public policy reasons).

74. *See* Engelhardt, *supra* note 10, at 542 ("Limited case law and virtually no statutory law addresses the enforcement of *in terrorem* clauses in trusts. Nevertheless, the reasons prompting the use of these clauses in wills—to protect the grantor's wishes, to avoid litigation, or to place an absolute limit on a beneficiary's interest in assets—also apply to trusts."); *see also* Beyer et al., *supra* note 5, at 228 (recognizing that, as of 1998, "[i]n Texas, as in most states, there is virtually no statutory law and very little case law addressing *in terrorem* clauses in inter vivos trusts").

75. *See supra* notes 9, 19.

because a forfeiture clause that appears solely in a will is likely to have little effect on a beneficiary's conduct when the decedent's assets "pour"[76] from the estate into the trust and are allocated among the beneficiaries by means of the trust agreement.[77] But trusts differ from wills because they usually last for an extended period of time and because, during that period, they vest ownership and control of the property in the hands of a trustee.[78] Indeed, the fiduciary relationship between the property's legal owner—the trustee—and the property's beneficial owners is the cornerstone of trust law.[79] The rising use of expansive trust forfeiture clauses is problematic because by disinheriting beneficiaries who seek oversight of this fiduciary relationship, the clauses threaten to forfeit trust altogether. The balance of this Part describes the rise of the management trust in modern estate planning, including this donative vehicle's benefits and challenges and, in particular, how those characteristics have resulted in trust forfeiture clauses that are far broader than their will counterparts and forbearers.

A. The Inter Vivos Trust in Modern Estate Planning: Benefits

Although trusts have been around since the thirteenth century,[80] the modern era of succession has seen the revocable inter vivos trust rival the will as the primary vehicle for transmitting wealth at death.[81] There are many reasons for this shift, even in modest es-

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76. Beyer et al., *supra* note 5, at 228-29 ("Where a will pours over into an established trust, at least one court has refused to apply the *in terrorem* clause in the will to a contest directed at the trust. Consequently, the settlor or testator who wants to avoid contests should include an *in terrorem* clause in both instruments."); Engelhardt, *supra* note 10, at 561 ("Estate planners frequently use pour-over wills to consolidate an individual's estate planning vehicles into a single dispositive plan. This technique creates an inter vivos trust ... into which flow assets passing under a will, life insurance proceeds, or pension plan benefits. An individual can create either a funded or a 'dry' inter vivos trust, depending on the purpose for which it was created.").

77. *See* Engelhardt, *supra* note 10, at 542-43, 561-62.

78. *See infra* Part II.A-C.

79. *See infra* Part II.A-B.

80. *See* 1 AUSTIN WAKEMAN SCOTT, WILLIAM FRANKLIN FRATCHER & MARK L. ASCHER, SCOTT AND ASCHER ON TRUSTS § 1.4 (5th ed. 2006) [hereinafter SCOTT ON TRUSTS].

81. DUKEMINIER & SITKOFF, *supra* note 12, at 385; Frances H. Foster, *Privacy and the Elusive Quest for Uniformity in the Law of Trusts*, 38 ARIZ. ST. L.J. 713, 717-18 (2006); Langbein, *supra* note 12, at 1108-09.

tates where planning to avoid taxes is less important. The most well-known advantage, touted by the do-it-yourself community,[82] is that assets held in a trust do not pass through probate and thus avoid the administrative inconvenience for which some jurisdictions' probate courts are famous.[83] Almost as popular a reason for using a trust rather than a will to divide and disburse assets is the privacy these vehicles afford.[84] Thus, although the public has scrutinized and dissected estates of celebrities like Michael Jackson, Robin Williams, and Joan Rivers, the specifics of these public figures' plans have remained private because each has used a trust—revocable during life but fixed at death—to distribute and presumably manage assets.[85] Inter vivos trusts also provide greater ongoing jurisdictional flexibility than testamentary trusts, allowing a trust's situs to be shifted should doing so become useful.[86]

Benefits that stem specifically from the management aspects of inter vivos trusts provide additional reasons for the popularity of these planning devices. If a settlor decides to fund her trust during life, the trustee can help manage the assets without court intervention even if the settlor's ability to manage them herself diminishes, thereby ensuring continuity and avoiding the costs and administra-

82. *See, e.g.*, NORMAN F. DACEY, HOW TO AVOID PROBATE 13-15 (1965); *see also* Horton, *supra* note 10, at 1715-21 (describing trust mills and do-it-yourself drafting movement).

83. DUKEMINIER & SITKOFF, *supra* note 12, at 468. Relatedly, as compared with testamentary trusts, stand-alone trusts avoid continued probate court supervision, which often requires formal (and expensive) periodic accountings. *Id.*

84. *See* Foster, *supra* note 8, at 564-66; Foster, *supra* note 81, at 714-15.

85. *See* Zach O'Malley Greenburg, *The Scandalously Boring Truth About Michael Jackson's Will*, FORBES (Aug. 17, 2012, 3:30 PM), http://www.forbes.com/sites/zackomalleygreenburg/2012/08/17/the-scandalously-boring-truth-about-michael-jacksons-will/ [http://perma.cc/AA55-GYZ7]; Danielle Mayoras & Andy Mayoras, *Joan Rivers' Estate Planning Was No Laughing Matter*, PROBATE LAW. BLOG (Dec. 17, 2014), http://www.probatelawyerblog.com/2014/12/joan-rivers-estate-planning-was-no-laughing-matter.html#more [http://perma.cc/JJ8X-LCK7] (describing Joan Rivers's revocable trust); Danielle Mayoras & Andy Mayoras, *What's Next for Robin Williams' Family and Estate?*, FORBES (Aug. 12, 2014, 4:59 PM), http://www.forbes.com/sites/trialandheirs/2014/08/12/whats-next-for-robin-williams-family-and-estate/ [http://perma.cc/8CU6-FBZL] (describing Robin Williams's use of trusts in his estate planning); David Shulman, *Michael Jackson's Will Filed with Court*, S. FLA. EST. PLAN. L. BLOG (July 1, 2009), http://www.sofloridaestateplanning.com/2009/07/articles/estate-tax/michael-jacksons-will-filed-with-court/ [http://perma.cc/RW74-QMYT] (describing Michael Jackson's pour-over will and trust).

86. DUKEMINIER & SITKOFF, *supra* note 12, at 468 (describing how settlors avoid ongoing accounting requirements and take advantage of other states' more favorable laws through revocable trust planning).

tive inconvenience of a formal, court-supervised guardianship or conservatorship proceeding.[87] Following the settlor's death, the advantages of trust planning over outright gifts are equally meaningful. Trusts can provide beneficiaries with protection from most creditors, including tort victims and even ex-spouses.[88] Trusts also impose a measure of control over beneficiaries' access to funds over time; a settlor who is concerned that the objects of her bounty might not use or invest funds wisely can vest decision making with a trusted individual or institution responsible for managing and distributing the property.[89]

B. The Inter Vivos Trust in Modern Estate Planning: Challenges

Although donative trusts can provide significant advantages over outright bequests, they also pose weighty design and administrative challenges that stem from the fact that trusts separate beneficial from legal ownership and usually involve administration of property over an extended period of time.[90] As I have explained in a previous article:

> no property owner can predict perfectly how the years will affect her beneficiaries and her possessions. Beneficiaries' needs will change, for example, as the beneficiaries marry or divorce, start or lose a business, or develop or overcome an illness or addiction. Investments too will change, for example, by under or over-performing, reacting to world events, or re-forming into a different shape altogether. How the settlor would want her gift

87. *Id.* at 465.

88. *Id.* at 691-703.

89. *See* Langbein, *supra* note 11, at 637-43 (describing management aspects of modern donative trusts).

90. *See, e.g.*, SCOTT ON TRUSTS, *supra* note 80, § 1.1; Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045, 1048 (1991); Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 623 (2004); Lee-ford Tritt, *The Limitations of an Economic Agency Costs Theory of Trust Law*, 32 CARDOZO L. REV. 2579, 2587-88, 2614 (2011). One commentator aptly characterized private donative trusts as gifts "projected on the plane of time, and so subjected to a management regime." Bernard Rudden, Book Review, 44 MOD. L. REV. 610, 610 (1981); *see also* Thomas P. Gallanis, *The New Direction of American Trust Law*, 97 IOWA L. REV. 215, 217 (2011) (quoting Rudden, *supra*); John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 YALE L.J. 165, 165 (1997) (same).

> to accommodate these endless permutations is difficult to anticipate and therefore to counsel, which is a particular problem in a legal realm where the typical court resolving such a dispute would prioritize the settlor's intention over all else.[91]

In my previous work, I have noted that "[t]here are two possible approaches to this planning dilemma, and most trust arrangements combine gradations of each."[92] The first approach is "to draft a trust agreement that provides the trustee with clear distribution standards, describes the settlor's primary concerns, and dictates responses to various contingencies that are likely to arise."[93] With this approach, however, the parties must be willing to bear the administrative costs of drafting for contingencies.[94] Moreover, the directives work well only if the settlor's predictions are accurate.[95] Recognizing that all the planning in the world still cannot control the future, the second approach to dealing with the imperfect foresight that accompanies a gift over time is to repose significant discretion in a

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91. Deborah S. Gordon, *Trusting Trust*, 63 U. KAN. L. REV. 497, 503-04 (2014); *see supra* notes 20, 32 and accompanying text; *see also* Kelly, *supra* note 32, at 1160; Sitkoff, *supra* note 90, at 638 ("[T]he law regularly subordinates the interests of the beneficiaries as residual claimants to the dead-hand interests of the settlor, an outgrowth of the frequently paternalistic function of the donative trust."). *But see* Gallanis, *supra* note 90, at 216 ("American trust law, after decades of favoring the settlor, is moving in a new direction, with a reassertion of the interests and rights of the beneficiaries.").

92. Gordon, *supra* note 91, at 504; *see also* Melanie B. Leslie, *Trusting Trustees: Fiduciary Duties and the Limits of Default Rules*, 94 GEO. L.J. 67, 89 (2005) ("Parties that cannot anticipate all potential agency cost problems rely on fiduciary duties as a substitute for express contract provisions.").

93. Gordon, *supra* note 91, at 504; *see also* Kristen E. Caverly, *Help Clients Grant the Right Level of Trustee Discretion*, 39 EST. PLAN. 18, 19-28 (2012) (providing samples of language to guide trustee discretion); Benjamin H. Pruett, *Tales from the Dark Side: Drafting Issues from the Fiduciary's Perspective*, 35 ACTEC J. 331, 341-47 (2010) (same).

94. *See, e.g.*, Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795, 813 (1983) ("[T]he transaction costs involved in drawing up a detailed prior agreement covering all possible discretionary uses of power over the life of the relation would not only be enormous, but also would probably exceed the benefits of the proposed relation. A more general document (whether a contract, trust, or charter) setting forth only the main purposes of the relation and the broad functions of the fiduciary would not impose such great transaction costs, but would less adequately prevent specific abuses of power."); Kelly, *supra* note 32, at 1158-61 (describing costs and contingencies); Melanie Leslie, *Common Law, Common Sense: Fiduciary Standards and Trustee Identity*, 27 CARDOZO L. REV. 2713, 2719 (2006) ("Settlors and trustees cannot draft agreements that accurately anticipate and resolve all future conflicts.").

95. *See* Seth W. Krasilovsky, *Exercising Discretion in Administering Discretionary Trusts*, 36 EST. PLAN. 32, 32 (2009).

trustee.[96] In other words, the trust agreement's distributive and investment directives are drafted to allow the trustee flexibility to deal with whatever inevitable uncertainties time may engender.[97]

As inadequate as the first approach may seem because of the costs associated with trying to anticipate what will happen in the future and the gaps and chinks that are likely to appear with the passage of time,[98] the second approach is equally troublesome. The second approach offers little reassurance to the settlor that her vision will be followed, scant guidance to the trustee on how best to accommodate the different interests of the beneficiaries and the settlor, and few guideposts to the beneficiaries on whether the trustee is acting in accordance with the trust that the settlor has reposed in her. In fact, what this approach offers is a relationship situated in the context of standards for fiduciary conduct generally.[99] The greater the discretion, the more important fiduciary duties are to ensuring that the trust functions properly, that the trustee does not take advantage of her position, and that she devotes

96. Edward C. Halbach, Jr., *Problems of Discretion in Discretionary Trusts*, 61 COLUM. L. REV. 1425, 1425 (1961); *see also* Krasilovsky, *supra* note 95, at 34-35 (providing examples of "absolute discretion" language).

97. Halbach, *supra* note 96, at 1426; *see also* Peter B. Tiernan, *A Trustee's Duties and Responsibilities Under Discretionary Invasion Provisions*, 79 FLA. B.J. 50, 50 (2005) (describing standards of discretion that appear in trusts).

98. *See* Cooter & Freedman, *supra* note 90, at 1048-49. Although default rules often help clarify obligations where an instrument is silent, *see, e.g.*, Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 FORDHAM L. REV. 1031, 1032 (2004) [hereinafter Hirsch, *Default Rules*], whether these default rules are satisfactory has been another subject of avid debate. *See* Cooper, *supra* note 11, at 1173 n.32; Hirsch, *Default Rules*, *supra*, at 1039; Adam J. Hirsch, *Text and Time: A Theory of Testamentary Obsolescence*, 86 WASH. U. L. REV. 609, 627-28 (2009); Melanie B. Leslie, *Enforcing Family Promises: Reliance, Reciprocity, and Relational Contract*, 77 N.C. L. REV. 551, 561 (1999) [hereinafter Leslie, *Family Promises*]; *see also* Leslie, *supra* note 92, at 70 (arguing "that characterizing trustees' fiduciary duties as pure 'default rules' ... blinds academics and courts to the need to develop a coherent theory about the extent to which fiduciary duties can be modified.").

99. *See* Pruett, *supra* note 93, at 341 ("One of the most difficult tasks trustees face is how to exercise broad (and generic) discretion in the administration of trusts, whether the trust is fully discretionary, with no standards whatsoever, or discretionary subject to an ascertainable standard."); Robert H. Sitkoff, *Trust Law as Fiduciary Governance Plus Asset Partitioning*, *in* THE WORLDS OF THE TRUST 428, 430-31 (Lionel Smith ed., 2013) ("[S]pell[ing] out with specificity what the trustee should do in all possible future circumstances [is] an impossible task given transaction costs and the settlor's lack of clairvoyance. Instead, trust law provides the trustee with expansive default powers of administration, the trustee's exercise of which is subject to review *ex post* for compliance with the open-ended fiduciary duties of loyalty and prudence.").

sufficient attention to the trust.[100] After all, the trustee wields significant power based not only on her legal ownership and control of the trust property, but also on her superior access to information and, in many cases, the experience, expertise, and even status that caused her to be appointed in the first place.[101]

The duties imposed on a trustee are the most fundamental component of a trust relationship because they help keep the fiduciary accountable to the beneficiaries.[102] For that reason, trust law has traditionally placed limits on the entrustor's ability to circumvent or modify these duties, including the extent to which settlors may exculpate their trustees for mistakes.[103] Many jurisdictions have allowed a settlor to include a provision in a trust instrument exonerating a trustee for conduct taken in connection with her appointment as trustee, but these jurisdictions have placed both substantive and procedural limits on the enforcement of such clauses.[104] With respect to substance, a settlor may excuse a trustee for negligent conduct or permit a trustee to engage in specified self-interested transactions, but may not relieve a trustee from liability for "breach[es] committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries"[105]

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100. *See* Cooter & Freedman, *supra* note 90, at 1048-56.

101. Frankel, *supra* note 94, at 804-10, 813-14; Austin W. Scott, *The Fiduciary Principle*, 37 CALIF. L. REV. 539, 540-41 (1949); *see also* Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 912 (characterizing trustee as "a powerful prototype" of the fiduciary); Sitkoff, *supra* note 90, at 641 ("The de facto office of the trustee serves as the organizing hub for the various relations that aggregate into the trust."); Edward D. Spurgeon & Mary Jane Ciccarello, *The Lawyer in Other Fiduciary Roles: Policy and Ethical Considerations*, 62 FORDHAM L. REV. 1357, 1361 (1994) ("Fiduciary relations typically include those of trustee/beneficiary, guardian/ward, conservator/conservatee, principal/agent, attorney/client, partner/partner, executor/legatee.").

102. *See* UNIF. TRUST CODE § 105(b)(2) (UNIF. LAW COMM'N 2010) (requiring the trustee to "administer the trust in good faith, in accordance with the terms and purposes of the trust, and in the interests of the beneficiaries"); *see also* Langbein, *supra* note 3, at 1123-25.

103. *See* David Horton, *The Federal Arbitration Act and Testamentary Instruments*, 90 N.C. L. REV. 1027, 1067, 1067 n.232 (2012); Leslie, *supra* note 94, at 2746-52; Leslie, *supra* note 92, at 69-71.

104. Leslie, *supra* note 94, at 2748 ("[M]ost courts ... allow professional trustees to hide behind exculpatory clauses only if there is evidence that the settlor had full information, the trustee obtained advance approval, or the trustee is a non-professional.").

105. UNIF. TRUST CODE § 1008 (UNIF. LAW COMM'N 2010); *see also* McNeil v. McNeil, 798 A.2d 503, 509 (Del. 2002) (rejecting provision making decisions of trustees "not subject to review by any court"); RESTATEMENT (THIRD) OF TRUSTS § 96 (AM. LAW INST. 2012); RESTATEMENT (SECOND) OF TRUSTS § 222 (AM. LAW INST. 1959).

because doing so "would be to authorize the trustee to loot the trust."[106] Under these circumstances, courts have rejected settlor intent in favor of the concern that a trustee should act to serve the beneficiaries' interests and be accountable for her decisions.[107] With respect to process, a trustee bears the burden of demonstrating that an exculpatory clause was fairly negotiated with the settlor and therefore reflects her intent, acquiescence, and understanding.[108] The rationale for enforcing exculpatory clauses, subject to these safeguards, is very much akin to the rationale supporting forfeiture clauses: the property belongs to the settlor and is freely devisable pursuant to her direction and conditions.[109]

C. How Trusts' Structures and Uses Have Affected Trust Forfeiture Clauses

The most common challenges to trusts do not mirror the most common challenges to wills. There certainly are cases in which trust beneficiaries challenge the validity of a trust agreement based on the settlor's lack of capacity or a third party's undue influence.[110] In fact, a trust beneficiary theoretically has "a better chance of prevailing in a trust contest for lack of capacity as compared to a will contestant" because in many jurisdictions the capacity required to

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106. UNIF. TRUST CODE § 1008 (UNIF. LAW COMM'N 2010); Langbein, *supra* note 12, at 1106; *see also* Thomas P. Gallanis, *The Trustee's Duty to Inform*, 85 N.C. L. REV. 1595, 1621 (2007) ("The settlor of an irrevocable trust is given significant room to control the trustee's actions but cannot dispense with the core responsibility of the trustee to administer the trust in the interests of the beneficiaries.").

107. *See* Langbein, *supra* note 3, at 1124.

108. *See* UNIF. TRUST CODE § 1008 (UNIF. LAW COMM'N 2010); RESTATEMENT (SECOND) OF TRUSTS § 222(3) (AM. LAW INST. 2012); Horton, *supra* note 10, at 1728; Langbein, *supra* note 3, at 1124-25. For a discussion of how exculpatory clauses and forfeiture clauses serve slightly different purposes, see *infra* note 247.

109. Horton, *supra* note 10, at 1706-07, 1732; *see* Leslie, *supra* note 92, at 101.

110. *See, e.g.*, Cresto v. Cresto, 310 P.3d 1079, 1079 (Kan. Ct. App. 2013) (unpublished table decision), *review granted*, (June 20, 2014) (per curiam) ("The plaintiffs challenged the 2008 will and trust arguing the instruments were invalid based on undue influence."); *In re* Miller Osborne Perry Tr., 831 N.W.2d 251, 253 (Mich. Ct. App. 2013) (asking court to determine whether beneficiary had probable cause to challenge trust amendments based on undue influence); Nickles v. Spisak, No. 2013-P-0094, 2014 WL 2882429, at *5 (Ohio Ct. App. June 23, 2014) (claiming trust amendments were executed under undue influence); Wilson v. Dallas, 743 S.E.2d 746, 760-62 (S.C. 2013) (challenging undue influence in execution of will and irrevocable trust).

execute a trust is greater than the minimal capacity required to execute a will.[111] A forfeiture clause that discourages challenges to a trust agreement's validity deserves to be treated identically to a will forfeiture clause; the beneficiary who is considering whether to file a contest in the face of this type of clause knows that a "worthless" challenge, however defined,[112] will risk the inheritance the beneficiary otherwise receives. Like a litigant who is considering whether to settle a lawsuit,[113] the beneficiary can assess her options in light of a generally fixed factual context and can complain, or forbear from complaining, depending on how she values her risks and rewards. Allowing a settlor to include this traditional but narrow type of forfeiture clause to deter overly litigious beneficiaries is a fair way to balance the settlor's right to control her legacy against the inheritance system's responsibility to enforce only legitimate testamentary documents.

With the rise in the use of living trusts as property management devices, it has become more difficult as a practical matter to challenge trust agreement validity.[114] As noted above, an important advantage to inter vivos trusts is that they can be funded during life and used to administer, invest, and distribute assets during and even after a settlor loses capacity.[115] Although the trust is revocable, the settlor is the only person who can mount any challenges to it; the remaindermen must wait until the settlor's death before their interests vest and they have standing to bring a contest.[116] It is far more difficult to invalidate a trust agreement, or even one of its provisions, based on a claim that the settlor was unaware or not in control of what she was doing when she signed the agreement, or that she revoked it or did not execute it with the proper formalities,

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111. Beyer et al., *supra* note 5, at 229; *see also* Engelhardt, *supra* note 10, at 537. *But see, e.g.*, Ivie v. Smith, 439 S.W.3d 189, 200 (Mo. 2014) (en banc), *reh'g denied*, (Mo. Sept. 30, 2014) ("The capacity required to make or amend a revocable trust is the same as that required to make a will—'testamentary capacity.'") (citations omitted).

112. *See supra* Part I.B.

113. Begleiter, *supra* note 5, at 645 n.108, 671.

114. Of course, if the trust is simply an empty basket that receives property from the pour-over will, the challenge would most likely be to that will's validity.

115. DUKEMINIER & SITKOFF, *supra* note 12, at 465-68.

116. *See, e.g.*, *In re* Tr. No. T-1 of Trimble, 826 N.W.2d 474, 485-89 (Iowa 2013); *In re* Malasky, 736 N.Y.S.2d 151, 152-53 (App. Div. 2002); Moon v. Lesikar, 230 S.W.3d 800, 806 (Tex. App. 2007); UNIF. TRUST CODE § 603 (UNIF. LAW COMM'N 2010).

if the trust was funded and functioning during the settlor's life and she lived with its terms and received notice of its operations for some period of time.[117]

Many lawsuits involving trusts recognize the trust agreement's validity but claim that a trustee breached one or more fiduciary duties under that agreement, such as investing improperly,[118] favoring one beneficiary over another,[119] failing to share information or file accounts,[120] making ill-advised or unauthorized allocations or distributions,[121] or acting beyond the powers set forth in the trust instrument or under the law.[122] Because the most effective forfeiture clauses are tailored to the type of challenge that a property owner anticipates,[123] a settlor who seeks to deter litigation and incentivize harmony among her beneficiaries understandably would want to direct her forfeiture clause toward the most common types of contests. Not surprisingly, then, cautious and crafty draftspersons, seeking to dissuade beneficiaries from overlitigating, have started to include trust forfeiture clauses that specifically protect decision making by the settlors' hand-picked fiduciaries.[124]

Consider, for example, a trust forfeiture clause that appeared in a 2013 Georgia case and provided that if any of the settlor's four

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117. DUKEMINIER & SITKOFF, *supra* note 12, at 467 ("[I]f a trust continues as an ongoing operation for years before the settlor dies, generating monthly or yearly statements and involving various property transfers by a third-party trustee, a court is likely to be reluctant to set the trust aside.").

118. *See* BOGERT ET AL., *supra* note 13, § 701; Jonathan G. Blattmachr, *Reducing Estate and Trust Litigation Through Disclosure, In Terrorem Clauses, Mediation and Arbitration*, 36 ACTEC L.J. 547, 571 (2010); *see, e.g.*, *In re* Berget, No. A13-2295, 2014 WL 6863043, at *1 (Minn. Ct. App. Dec. 8, 2014).

119. *See* BOGERT ET AL., *supra* note 13, § 541; *see, e.g.*, *In re* Knichel, 347 S.W.3d 127, 129 (Mo. Ct. App. 2011).

120. *See* BOGERT ET AL., *supra* note 13, §§ 963, 966; *see, e.g.*, *In re* Thomas H. Gentry Revocable Tr., No. 29727, 2013 WL 376083, at *2 (Haw. Ct. App. Jan. 31, 2013).

121. *See* BOGERT ET AL., *supra* note 13, § 541; *see, e.g.*, Lefkowitz v. Bank of N.Y., 676 F. Supp. 2d 229, 236 (S.D.N.Y. 2009).

122. *See* BOGERT ET AL., *supra* note 13, § 541; *see, e.g.*, *In re* Fallgren Family Tr. *ex rel.* Fallgren, No. A13-2388, 2014 WL 7011156, at *1 (Minn. Ct. App. Dec. 15, 2014).

123. Leavitt, *supra* note 6, at 48 (explaining that courts historically did not allow generally worded forfeiture clauses to provide trustees with "blanket protection for their actions").

124. *See, e.g.*, *In re* Shaheen Tr., 341 P.3d 1169, 1170 (Ariz. Ct. App. 2015); Peterson v. Peck, 430 S.W.3d 797, 802 (Ark. Ct. App. 2013); Bradley v. Gilbert, 91 Cal. Rptr. 3d 680, 681-83 (Ct. App. 2009); Callaway v. Willard, 739 S.E.2d 533, 535 (Ga. Ct. App. 2013); Hamel v. Hamel, 299 P.3d 278, 289 (Kan. 2013); Commonwealth Bank & Tr. Co. v. Young, 361 S.W.3d 344, 353 (Ky. Ct. App. 2012); Di Portanova v. Monroe, 402 S.W.3d 711, 717 (Tex. App. 2012).

children filed "a legal or equitable challenge to the management decisions made or proposed by [the] trustee during the administration of [the] Trust, or pertaining to the management of the Trust Estate, or in regards to the final distribution of the Trust Estate" and did not succeed, the challenger forfeited all rights created by the trust.[125] Another example appears in a 2013 Arkansas case, "cancel[ling]" the share of any descendant of the settlor who instituted "any action to challenge the provisions of the trusts established by this document, or to attack the validity of such trusts, or to remove [the surviving spouse] as Trustee, or question her actions as Trustee."[126] A 2013 Kansas case describes a clause disinheriting any beneficiary who, among other things, "object[ed] in any manner to any action taken or proposed to be taken in good faith by the Trustee under said trust or any amendment to it."[127] Some settlors reinforce their motives by including express statements of their reasons for conditioning receipt of property on a beneficiary's acquiescence to the trustee's judgment and conduct. For example, one clause, discussed in a 2013 California case, described the trust's co-creators' aversion to "time consuming and costly litigation concerning the function of [the] Trust and disbursement of the assets," especially since they had "taken great care to designate, through the provisions of [the] Trust, how they want[ed] the Trust Estate distributed."[128]

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125. *Callaway*, 739 S.E.2d at 535.

126. *Peterson*, 430 S.W.3d at 802.

127. *Hamel*, 299 P.3d at 289; *see also* Tobias v. Korman, 141 S.W.3d 468, 477 (Mo. Ct. App. 2004) (enforcing a clause that provided: "If any beneficiary, excluding trustee, makes any allegation or causes litigation either prior to or after his death they will automatically forfeit their designated amount."). Experienced and thoughtful estate planners will consider their clients' specific family circumstances before inserting forfeiture clauses into wills and trusts rather than including these clauses as boilerplate in every client's documents. *See* T. Jack Challis, *Not So Fast: Drafting, Planning, and Litigating No Contest Clauses*, SS007 ALI-ABA 497, 502-05 (Sept. 13-14, 2010). In a 2010 presentation and paper that was part of the American Law Institute's Sophisticated Estate Planning Techniques series, T. Jack Challis advised against including "standard" clauses in testamentary documents and recommended consulting state law and conferring with clients regarding the clauses' intended scope and impact. *Id.* at 505.

128. Donkin v. Donkin, 314 P.3d 780, 784 (Cal. 2013), *cert. denied,* 135 S. Ct. 82 (2014); *see also* Wilson v. Dallas, 743 S.E.2d 746, 761 (S.C. 2013) (property owner "painstakingly developed his estate plan over the course of several years" and a "strong indicator of [his] intent is his inclusion of no-contest clauses in both his will and trust").

Although these clauses may vary linguistically, their purpose is the same: to cut down on the most likely challenges, presumably because such challenges can significantly reduce a trust's corpus, through payment of litigation expenses and fees, and can undermine a settlor's design for her property. The next Part describes judicial and legislative responses to these increasingly broad forfeiture clauses.

III. TRUSTS AND FORFEITURE CLAUSES

A significant number of appellate courts recently have had to decide whether to disinherit a trust beneficiary who questioned a trustee's decision making when the trust in question contained an expansive forfeiture clause that directed such a result.[129] Some jurisdictions have refused to enforce forfeiture clauses that are broad enough to apply to actions against fiduciaries, notwithstanding clear settlor intent to the contrary, citing "public policy."[130] Several other jurisdictions have deprived litigious beneficiaries of their rights to multi-million dollar trusts, finding that the beneficiaries forfeited those rights by challenging their trustees' decision making.[131] Still other courts have skirted the issue, not yet clarified their approach to it, or allowed it to become intertwined with other doctrines governing fiduciary conduct.[132] The Uniform Trust Code has no provision addressing trust forfeiture clauses, and the Restatement (Third) of Trusts has a provision that remains in draft form.[133] In other words, this topic is ripe for scrutiny. The balance of this Part

129. *See In re* Shaheen Tr., 341 P.3d at 1170; *Peterson*, 430 S.W.3d at 798; *Callaway*, 739 S.E.2d at 534-35; *Hamel*, 299 P.3d at 281; *Young*, 361 S.W.3d at 353; Rouner v. Wise, 446 S.W.3d 242, 260 (Mo. 2014); *In re* Dugan Revocable Living Tr., No. 60263, 2014 WL 549697, at *1 (Nev. Feb. 10, 2014); Frakes v. Nay, 295 P.3d 94, 100 (Or. Ct. App. 2013); *Di Portanova*, 402 S.W.3d at 717; *see also Donkin*, 314 P.3d at 785 (narrow forfeiture clause alleged to apply to broad range of conduct); *In re* Estate of Stan, 839 N.W.2d 498, 500 (Mich. Ct. App. 2013) (same); Shelton v. Tamposi, 62 A.3d 741, 746 (N.H. 2013) (same).

130. *See infra* Part III.A.

131. *See infra* Part III.B.

132. *See* Stewart v. Ciccaglione, No. CV074008040S, 2014 WL 1647035, at *3 (Conn. Super. Ct. Mar. 26, 2014) (opening issue of a forfeiture clause for the limited purpose of offering evidence); *Young*, 361 S.W.3d at 351 (holding that the merits of the claim that children violated a no-contest provision were not before the court); *see also infra* notes 217-18 and accompanying text.

133. *See infra* Part III.C.

describes the various approaches courts have taken, none of which seem particularly aware of countervailing views.

A. Public Policy and Fiduciary Duties: The California Approach

Several jurisdictions have refused to apply trust forfeiture clauses to beneficiaries who contested issues involving fiduciary conduct, regardless of how broadly and clearly those clauses were worded.[134] The courts that have taken this approach cite public policy as the basis for not enforcing clauses that "immunize fiduciaries from [state] law governing the actions of such fiduciaries."[135] Most have extracted this idea from precedent involving traditional will forfeiture clauses and have not specifically considered how, if at all, trusts differ.[136]

California courts have had a particularly robust opportunity to consider forfeiture clauses that apply to fiduciary conduct,[137] and for that reason *Bradley v. Gilbert* provides both a thorough discussion of the public policy approach and a compelling example of why a

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134. *See* TENN. CODE ANN. § 35-15-1014 (2014) (enforcement of no-contest, *in terrorem* or forfeiture provisions); *Donkin*, 314 P.3d at 796-97 (finding argument that "successor trustees engaged in misconduct when they failed to carry out the terms of the Family Trust instrument, as interpreted by the beneficiaries" to "fall within public policy exceptions for challenges to fiduciary misconduct and, therefore, as a matter of law, ... do not violate the no contest clauses"); *Callaway*, 739 S.E.2d at 535-38; *Di Portanova*, 402 S.W.3d at 717-19; *see also In re* Estate of Stralem, 695 N.Y.S.2d 274, 278 (Sur. Ct. 1999); Browder, *Re-Examined*, *supra* note 10, at 324 ("Where ... the condition seems broad enough to cover the conduct in question, the only issue should be whether public policy prevents its enforcement.").

135. *Callaway*, 739 S.E.2d at 539.

136. *See, e.g.*, *id.* (citing Sinclair v. Sinclair, 670 S.E.2d 59, 60-61 (Ga. 2008) and Snook v. Sessoms, 350 S.E.2d 237, 238 (Ga. 1986)); *Di Portanova*, 402 S.W.3d at 717-18 (citing McLendon v. McLendon, 862 S.W.2d 662, 667 (Tex. App. 1993) and Estate of Newbill, 781 S.W.2d 727, 728 (Tex. App. 1989)).

137. *See Donkin*, 314 P.3d at 797 n.15 ("[T]he law in California regarding no contest clauses has evolved over the course of many years, with an incremental specification by common law and statutory amendment of numerous public policy exceptions to the enforcement of no contest clauses" including challenges to fiduciary conduct); *see also, e.g.*, Rumph v. Mayo, No. B248765, 2014 WL 3362677, at *10 (Cal. Ct. App. July 10, 2014), *reh'g denied*, (Aug. 5, 2014) (refusing to disinherit beneficiaries because challenge to trustees' conduct under 1993 trust was not "frivolous"); Fazzi v. Klein, 119 Cal. Rptr. 3d 224, 232 (Ct. App. 2010) ("[A] trustee cannot 'hide behind a no contest clause' and commit breaches of fiduciary duty with impunity."); Hearst v. Ganzi, 52 Cal. Rptr. 3d 473, 485-86 (Ct. App. 2006) (beneficiaries' petition "to hold the Trustees personally liable for breach of fiduciary duty ... conflicts with the terms of the instrument and therefore would amount to a contest" in violation of no-contest clause).

settlor would choose to include a clause that conditions a beneficiary's continuing receipt of trust funds on her acquiescence to a trustee's decision making.[138] *Bradley* arose out of a distressing but not unfamiliar series of events. Parents, who were married for more than fifty years, created an estate plan in 1992 essentially leaving everything to the survivor and then to the couple's two adult children.[139] They achieved this result by executing a joint trust agreement, which, on the first death, divided the couple's property among three subtrusts: a marital trust, a family trust, and a survivor's trust.[140] Although the trust agreement did not give the surviving spouse power to change the beneficial interests in the marital or family trusts, it did permit the survivor, as trustee, to defer allocating assets among the subtrusts and to amend the survivor's trust.[141] The original trust instrument creating this plan contained a simple and typical forfeiture clause disinheriting anyone who "contest[ed] or attack[ed] [the] instrument or any of its provisions."[142] The surviving spouse was named as trustee of all three subtrusts, and the couple's son, Chris, was named successor trustee.[143] The total net worth of the couple at the time that they executed their joint estate plan was approximately $7.84 million.[144] Two years after signing those documents, the mother died.[145] Soon thereafter, the father, then in his seventies, "became romantically involved with one Flora Ibarra, a married woman, who became his live-in companion and caregiver."[146]

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138. *See* 91 Cal. Rptr. 3d 680 (Ct. App. 2009). Although *Donkin* is a more current description of California's approach to forfeiture clauses, the case primarily discusses procedural issues revolving around amendment of the California statute, so it is less helpful on the substantive issue of fiduciary conduct. *See infra* note 155.

139. *Bradley*, 91 Cal. Rptr. 3d at 681.

140. *Id.*

141. *Id.* at 681-82.

142. *Id.* at 682. The original clause provided, in full, as follows: "Non Contest-Contestant disinherited: If any beneficiary in any manner, directly or indirectly, *contests or attacks this instrument or any of its provisions*, any share or interest in the trust given to that contesting beneficiary under this instrument is revoked and shall be disposed of in the same manner provided herein as if that contesting beneficiary had predeceased the Settlor." *Id.* (emphasis added).

143. *Id.*

144. *Id.* at 684.

145. *Id.* at 682.

146. *Id.*

Increasingly set apart from their father over the ensuing decade, the children learned of his death only upon receipt of a probate petition.[147] At that time, the children also learned that the value of the marital and family trusts, which became irrevocable on their mother's death and for which Chris was to succeed his father as trustee, had dropped to $177,000.[148] Not surprisingly, the children began to question their father's conduct as fiduciary vis-à-vis their mother's estate and the trusts that the parents created together.[149] From 1995, when the father's relationship with Ibarra began, until 2006, when the father died, he amended the "survivor's trust" nine times, reducing shares for his children, increasing shares for Ibarra and her family, and naming his office assistant (rather than his son) as successor trustee.[150] The father also significantly rewrote—and expanded—the forfeiture clause in the survivor's trust to discourage any challenges to his new estate plan.[151] The revised forfeiture clause applied not only to anyone who contested the validity of the testamentary documents but also to anyone who challenged appointment of and actions by fiduciaries, property designations and allocations among the trust and other assets owned by the decedent at death, and transactions affecting Ibarra or her family.[152] Nearly two pages in length, the forfeiture clause provided that any beneficiaries who engaged in prohibited behaviors listed in thirteen separate sections would be "specifically disinherit[ed]" and all interests otherwise given to that person, his spouse, and his issue "forfeited" as if the person were predeceased.[153] Specific triggers for depriving a beneficiary of rights under the trust included, among other things:

> (1) Contesting the trust agreement or will, or "in any manner" seeking "to impair or invalidate" any of their respective provisions;
>
> (2) Claiming "entitlement to any asset" owned by the decedent or his trust "whether or not such claim is successful";

147. *Id.* at 684.
148. *Id.*
149. *Id.*
150. *Id.* at 682.
151. *Id.*
152. *Id.* at 682-84.
153. *Id.* at 683.

> (3) Unsuccessfully challenging appointment of any fiduciary or unsuccessfully seeking that fiduciary's removal; and
>
> (4) Objecting "in any manner to any action taken or proposed to be taken in good faith" by any fiduciary ("including, without limitation, the good faith exercise or non-exercise of any discretion granted" to that fiduciary) regardless of how or when the action was taken and "whether or not such claim is successful."[154]

Regardless of how an observer feels about the father changing his estate plan and allocating particular assets to and among the various subtrusts, either as trustee or as co-settlor, it is easy to see why the father included such an extensive forfeiture clause: it provided added insurance that his intent would be effectuated because beneficiaries who challenged his decision making would potentially forfeit their inheritances. In other words, anticipating animosity between his children and Ibarra, his companion, he seemed determined to make his children think carefully before contesting his plan and any decision making associated with it. The father's intent is not hard to discern.

At the time of the father's death, California had in place a summary review procedure for determining whether an action would violate a forfeiture clause,[155] and the son therefore sought a ruling

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154. *Id.* at 682-84.

155. Forfeiture clauses in California are recognized and governed by statute, the most recent version of which was enacted in 2010 in an effort to simplify what had become an overly complex and heavily litigated piece of legislation. *See* Donkin v. Donkin, 314 P.3d 780, 788-90 (Cal. 2013). From 1989, when study of these clauses and their common law enforcement began, until 2010, the statutory scheme included a list of actions that, for public policy reasons, could be brought *without* triggering forfeiture. *Id.* at 787-88. For example, prior to 2010, the California probate code provided that "'notwithstanding anything to the contrary'" in a testamentary instrument, "pleadings that 'challeng[e] the exercise of a fiduciary power ... do not violate a no contest clause as a matter of public policy.'" *Id.* at 796-97 (quoting CAL. PROB. CODE § 21305(b)(6) (West 2005)). A new study of the clauses occurred in 2005, and the Commission issued a report in 2008, recognizing that there were still many "important public policy" reasons to enforce the forfeiture provisions, either in wills or trusts, including "respecting a transferor's ability to control the use and disposition of his or her own property and to avoid the cost, delay, public exposure, and additional discord between beneficiaries involved in litigation over the transferor's estate plan." *Id.* at 788. Because California is a community property state, the Commission also recognized that "proper disposition of a transferor's property [may be] complicated by difficult property characterization issues," (separate vs. community) so that "a no contest clause may also appropriately operate as a 'forced election' in order to avoid ownership disputes." *Id.* The legislature decided to amend the statute and

that a petition, by him as trustee, to marshal assets of the marital and family trusts would not violate the expansive forfeiture clause in the survivor trust.[156] The son first argued that a statutory exception to forfeiture clauses applied because he filed the suit as a trustee, rather than as a beneficiary, and was seeking to determine whether actions taken by his father, the previous trustee, were in contravention of any fiduciary duties.[157] In response, the successor trustee of the survivor trust argued that the settlor amended that trust to include the "draconian" forfeiture clause for the reason of prohibiting the settlor's children or anyone else from contesting actions taken by him as trustee, which was precisely what the son was doing.[158] Regardless of whether the son brought his claims as trustee or beneficiary, the trustee argued, the son's "petition would impermissibly thwart [the decedent's] intended estate plan," and therefore the petition should invoke the forfeiture clause.[159] In other words, the broad trust forfeiture clause's legality was directly at issue.

Refusing to allow settlor intent to trump fiduciary accountability, both the trial and reviewing courts agreed that a petition to marshal assets, and any other challenge to fiduciary conduct, would not trigger a forfeiture clause even if the beneficiary (and not the trustee) filed the petition.[160] "Public policy," the appellate court explained, allows a beneficiary "to question the actions of a faithless fiduciary without being subject to the restrictions of such a clause" because detecting and deterring "errant fiduciaries" who are "engaged in misconduct" is an important purpose of a court's oversight and cannot be overwritten by a property owner.[161]

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remove what were known as "safe harbor proceedings," which essentially added a second layer of litigation. *Id.* at 790. The simplified probate code provides that only certain defined categories of actions will trigger forfeiture: "direct contests," defined as challenges to the instrument or execution thereof; creditors' claims, but only if they are specifically mentioned in the no-contest clause; and claims about characterization of property, but only if they are mentioned in the no-contest clause. *Id.*

156. *Bradley*, 91 Cal. Rptr. 3d at 684.

157. *Id.* at 685.

158. *Id.*

159. *Id.*

160. *Id.* at 686, 689.

161. *Id.* at 688.

This broad public policy rejection of trust forfeiture clauses is not really new, having appeared in an old New York case that considered the legality of a particularly "drastic" clause[162] conditioning trust beneficiaries' gifts on receipt of a written document "acquiesce[ing] in the administration of said trusts" and "approv[ing], ratify[ing] and confirm[ing] all acts and things done by the respective Trustees thereunder ... with respect to the administration of the trust properties."[163] The settlor, who had created and funded two inter vivos trusts of $10 million apiece, explained in the trust instruments that he was including this condition because he had "been kept informed of such administration, and [was] completely satisfied therewith" and "desire[d] ... all which has been done and all the acts which have been taken by the Trustees."[164] The Westchester County Surrogate refused to enforce the clause, reasoning in a quite long and thoughtful opinion that the "attempted provision runs counter to the very fundamental principles of trust law" including the state's "real interest in having its courts of equity supervise trust administration."[165] Courts in Georgia and Texas also have refused to enforce

162. Leavitt, *supra* note 6, at 56.

163. *See In re* Andrus' Will, 281 N.Y.S. 831, 840 (Sur. Ct. 1935).

164. *Id.* at 839-40. *But see In re* Tumminello v. Bolten, 873 N.Y.S.2d 731, 732 (App. Div. 2009) (finding that trust beneficiary lacked standing to compel his sister, trustee of trust established by their father, to account because beneficiary had previously sought a ruling that the trust was "null and void" and, in so doing, triggered forfeiture clause, which prohibited any beneficiary from contesting "the Trust or any of its provisions in any manner, 'directly or indirectly'").

165. *Andrus*, 281 N.Y.S. at 850. The continued viability of the eighty-year-old *Andrus* case is not entirely clear, however, given New York's current approach to fiduciary oversight, which applies different standards to wills and trusts. Although New York law permits testamentary forfeiture clauses, N.Y. EST. POWERS & TRUSTS LAW § 3-3.5 (McKinney 2014), it prohibits testamentary *exculpatory* clauses. *Id.* § 11-1.73(a)(1). At least one New York surrogate's court has struck down a forfeiture clause that was triggered by challenges to fiduciary decision making by relying on the legislative history of the exculpatory clause statute and reasoning that a clause disinheriting any trust beneficiary who refused to "execute releases to the trustees as a precondition to sharing" attempted a "not so clever[]" end-run around statutory prohibition on exculpatory clauses. *In re* Estate of Stralem, 695 N.Y.S.2d 274, 276-77 (Sur. Ct. 1999). The *Stralem* court reasoned that "forcing the beneficiaries to accept the accounting as presented with no opportunity to challenge it on grounds of failure to exercise reasonable prudence, care and diligence" was equivalent to exculpating the fiduciaries for negligent conduct and therefore void as against public policy. *Id.* at 278; *cf. In re* Estate of Prevratil, 990 N.Y.S.2d 697, 705-06 (App. Div. 2014) ("[E]ven if decedent's intent were to prohibit a beneficiary from questioning the conduct of [the executor], such a broad no contest clause would be void as against public policy."). The ban on exculpating fiduciaries, however, has not been extended to trusts. Ilene S. Cooper & Robert M. Harper, *Incomplete Protection:*

provisions that penalize beneficiaries for questioning trustee conduct, regardless of the settlors' explicitly stated desires to allow their trustees to act without impediment.[166]

In 2013, Tennessee, seeking to become more competitive in its trust business, enacted comprehensive trust legislation that included a statute expressly addressing broad trust forfeiture clauses.[167] The statute defines a forfeiture clause to include a provision that "would reduce or eliminate the interest of any beneficiary of such trust who, directly or indirectly, initiates or otherwise pursues ... [a]ny action to challenge the acts of the trustee or other fiduciary of the trust in the performance of the trustee's or other fiduciary's duties."[168] Although the statute directs courts to "enforce the settlor's intent as reflected in a no-contest provision to the greatest extent possible,"[169] the statute excludes challenges to fiduciary conduct from the list of contests that would trigger forfeiture.[170] Those contests are limited to allegations of fraud, lack of capacity, mistake, and other challenges to document validity.[171] In other words, like California, Tennessee prohibits forfeiture clauses that discourage beneficiaries from suing their trustees for trust-related decision making.[172] Interestingly, the state legislature has presumably decided that Tennessee will gain prominence as a trust-friendly

Exoneration Clauses in New York Trusts and Powers of Attorney, 28 TOURO L. REV. 379, 383 (2012) (recognizing that "courts have reached conflicting conclusions as to the applicability of EPTL section 11-1.7 to inter vivos trust instruments and the enforceability of the exculpatory provisions contained in them," and recommending an extension of the statute to trusts); *see also In re* Jastrzebski, 948 N.Y.S.2d 689, 691 (App. Div. 2012) (same); *In re* Mankin, 930 N.Y.S.2d 79, 80 (App. Div. 2011) ("While the essential ingredient of a trust is the accountability of the trustee, exculpatory provisions ... are valid in inter vivos trusts so long as there is some accountability, at least to the settlor."); Bauer v. Bauernschmidt, 589 N.Y.S.2d 582, 583 (App. Div. 1992) (same); *In re* Will of Mednick, 587 N.Y.S.2d 127, 128 (Sur. Ct. 1992) ("[L]imitations on the powers and immunities of testamentary trustees under EPTL 11-1.7 do not apply to *inter vivos* trustees."). It is therefore not entirely clear how the jurisdiction would view an expansive forfeiture clause in an inter vivos trust.

166. Callaway v. Willard, 739 S.E.2d 533, 536-39 (Ga. Ct. App. 2013); Di Portanova v. Monroe, 402 S.W.3d 711, 717 (Tex. App. 2012).

167. TENN. CODE ANN. § 35-15-1014 (West 2014) (effective July 1, 2013).

168. *Id.* § 35-15-1014(a)(3).

169. *Id.* § 35-15-1014(d).

170. *Id.* § 35-15-1014(b), (c)(1).

171. *Id.* § 35-15-1014(b)(1)-(8).

172. *Id.* § 35-15-1014(c)(1) (clauses not enforceable in actions "brought solely to challenge the acts of the trustee ... to the extent [the trustee] has committed a breach of fiduciary duties or breach of trust").

state, even though its legislation does not honor settlor intent as expressed in expansive trust forfeiture clauses.

These jurisdictions that reject trust forfeiture clauses on public policy grounds justify their approach by recognizing that beneficiaries must be able to police their fiduciaries' conduct or a trust itself would be meaningless. Although this position seems intuitively correct, its blanket prohibition on trust forfeiture clauses essentially ignores the role of donative intent. Especially if the interpersonal relationships involved in the particular trust's administration are likely to be contentious, a rule that incentivizes a beneficiary to refrain from filing frivolous complaints against her trustees might better balance all parties' interests. Presumably for this reason, several jurisdictions have enforced expansive trust forfeiture clauses to disinherit beneficiaries who challenged their trustees' decision making. The next Section describes this recent spate of cases.

B. Settlor Intent and Trustee Expertise: Enforcing Forfeiture Clauses

In contrast to the public policy approach, and in the name of settlor intent, trustee expertise, and plain language, several jurisdictions have either divested litigious beneficiaries of the right to inherit trust property or acknowledged that the law may allow for such disinheritance.[173] All of the "contests" brought by the beneficiaries in these cases, regardless of how they were styled, involved claims that were directed toward trustee decision making at some point after the trusts had been funded and during the course of the trusts' administrations. This rapidly evolving trend is noteworthy because, by assuming that forfeiture clauses in trusts are identical to forfeiture clauses in wills and therefore subject to the same analysis, these courts have ignored the differences between the donative vehicles—especially that trust law's essence is fiduciary accountability.

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173. *See In re* Shaheen Tr., 341 P.3d 1169, 1171-72 (Ariz. Ct. App. 2015); Peterson v. Peck, 430 S.W.3d 797, 802-03 (Ark. Ct. App. 2013); Shelton v. Tamposi, 62 A.3d 741, 746 (N.H. 2013); *see also* Hamel v. Hamel, 299 P.3d 278, 288-89 (Kan. 2013) (acknowledging validity of such clauses but refusing to apply in specific factual context); *In re* Dugan Revocable Living Tr., No. 60263, 2014 WL 549697, at *1 (Nev. Feb. 10, 2014) (same).

The most recent appellate body to adopt this approach is the Arizona Court of Appeals, which, on January 16, 2015, decided to divest two trust beneficiaries of their interests in a 1994 trust because those beneficiaries included at least one meritless claim against the trustee in a petition that contained multiple breach of trust claims.[174] The case, *In re Shaheen Trust*, involved a forfeiture clause that revoked any gift to any beneficiary who "directly or indirectly, contest[ed] or attack[ed] the validity of either Settlor's Will, [the] Trust or any disposition under either, by filing suit against ... Trustee."[175] The trial court refused to enforce the clause not because the clause contravened public policy, but rather because the court found that the statute authorizing testamentary no-contest clauses did not apply to trusts.[176] The appellate court reversed, reasoning that "although no-contest provisions in wills are governed by statute, and no-contest provisions in trusts are governed by the Restatement, the standard for evaluating the enforceability of such clauses does not differ between wills and trusts."[177] In other words, the *Shaheen* court did not consider how trust forfeiture clauses might differ from will forfeiture clauses and instead, following its will precedent, held that the trust forfeiture clauses are triggered if a "contest" lacks "probable cause."[178]

Explaining that the issue of whether plaintiffs had probable cause to bring their petition was a question of law, the *Shaheen* appellate court proceeded to evaluate the basis for the plaintiffs' claims in order to determine whether the plaintiffs' "contest" would trigger the forfeiture clause and result in disinheritance.[179] This question prompted a close analysis of the purpose for forfeiture

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174. *See Shaheen Tr.*, 341 P.3d at 1172-73.

175. *Id.* at 1170.

176. *Id.* at 1171.

177. *Id.*

178. *Id.* at 1171-72. The *Shaheen* court went on to explain Arizona's probable cause standard as follows:

> Probable cause, in this context, is defined as 'the existence, *at the time of the initiation of the proceeding*, of evidence which would lead a *reasonable person, properly informed and advised*, to conclude that there is a *substantial likelihood that the contest or attack will be successful*.' ... Subjective belief that the claims are likely to succeed, while required, is not sufficient; the petitioner's subjective belief must be objectively reasonable.

Id. at 1172 (internal citations omitted).

179. *Id.* at 1172-73.

clauses, because the *Shaheen* plaintiffs' single petition had at least nine separate claims,[180] and the court was asked to decide, as an issue of first impression, whether the forfeiture clause would apply if only one of the claims lacked probable cause.[181] In thinking about the general public policy reasons that caution for and against enforcing these clauses, the *Shaheen* court focused on how the clauses "preserv[e] the transferor's donative intent, avoid[ ] waste of the estate in litigation, and avoid[ ] use of a will contest to coerce a more favorable settlement to a dissatisfied beneficiary" but prevent parties from "prov[ing] a donative transfer is genuinely invalid."[182] Requiring that each separate challenge in a single petition be supported by probable cause, the court explained, would serve those competing interests by making parties "carefully consider each challenge they might raise before filing a petition and instituting costly litigation."[183] The "contest" that the court found to trigger forfeiture of the beneficiaries' interests did not question the trust instrument's validity, but instead alleged that the trustee was required to make yearly, rather than monthly, distributions to herself, "despite the absence of supportive language in the trust document, legal authority, or other credible evidence."[184] As a result of including this claim questioning the trustee's decision making, and regardless of the merit of the other claims in the petition, the beneficiaries forfeited their interests in the trust.

Another receptive approach to a trust forfeiture clause that was triggered by a challenge to trustee conduct appeared in the 2013 Arkansas case *Peterson v. Peck*, which involved a dispute between a property owner's widow and his daughter over ownership of a unique and valuable work of art.[185] *Peck* is particularly noteworthy because it appears that forfeiture was triggered merely by the beneficiary's filing of the contest, regardless of whether the

180. *Id.* at 1173 n.3.
181. *Id.* at 1169, 1172.
182. *Id.* at 1172.
183. *Id.*
184. *Id.* at 1172-73.
185. Peterson v. Peck, 430 S.W.3d 797, 798 (Ark. Ct. App. 2013). The artwork, a mobile designed by Alexander Calder and called "Autumn Leaves," had been acquired by the settlor's parents in the 1950s. *Id.*

beneficiary had probable cause or ultimately prevailed.[186] The property owner in *Peck* had created various trusts to benefit his wife and, upon her death, the children of their blended marriage; he appointed himself original trustee of the trust, named his wife successor trustee, and transferred to the trust certain items of tangible personal property.[187] The trust agreement contained what was called a "share-cancellation" provision, disinheriting any beneficiary who "institute[d] any action to challenge the provisions of the trusts established by [the] document, or to attack the validity of such trusts, or to remove [his wife] as Trustee, or question her actions as Trustee."[188]

After the decedent died, his wife sold the artwork for nearly $4 million, and the decedent's daughter sued, claiming that her father, by means of two letters, had allocated the artwork to the daughter's trust share.[189] The daughter also sought a trust accounting and alleged that the wife had breached various duties as trustee.[190] The trial court sided with the wife, finding that "there was no evidentiary support that [she] acted in bad faith or reckless indifference with regard to her trust duties, and thus [the daughter] forfeited her interests in the trust through the share-cancellation provision."[191] The Arkansas appellate court refused to review the underlying issue of whether the trust allocated the valuable artwork to the daughter. The appellate court agreed, however, that the daughter, by virtue of her challenges to the wife's conduct, had forfeited her interests in the trust regardless of the underlying merits of her claim.[192] In so holding, the court rejected the daughter's argument that a challenge to a fiduciary's conduct did not constitute a "contest" that could trigger forfeiture.[193] Because the language of the

186. *Id.* at 803.
187. *Id.* at 798-99.
188. *Id.* at 802.
189. *Id.* at 799. She also argued that her father had made a valid inter vivos gift of the artwork to her directly, although this claim did not impact the trust forfeiture clause. *Id.* The court found that the daughter had failed to prove all of the elements of an inter vivos gift. *Id.*
190. *Id.*
191. *Id.*
192. *Id.* at 802-03.
193. *Id.* The Arkansas Supreme Court had previously held that a beneficiary's challenge to an executor's decision to sell estate assets did not trigger forfeiture, but the provision at issue in that case "only prohibited attacks upon the will." *Id.* at 803.

"share-cancellation" clause in the decedent's trust was broadly written and expressly applied to questions involving trustee conduct, the court reasoned, the daughter forfeited any claim to the artwork because her "allegations questioned [her stepmother's] actions as trustee and asked the court to control [those] actions as trustee."[194] Moreover, although the cancellation provision did not specify whether it would be triggered if the complaining beneficiary's grievances turned out to be well founded (and therefore helpful to the trust's ongoing administration),[195] the court's refusal to review those underlying questions implied that forfeiture would occur regardless of whether the trustee's actions were improper.[196]

The final case that bears discussion is a procedurally complex 2013 case from New Hampshire,[197] *Shelton v. Tamposi*,[198] which led to the complete disinheritance of a daughter whose litigious conduct was found to have violated a narrow no-contest provision that explicitly purported not to "preclude any beneficiary from enforcing, by litigation or otherwise, ... the trustee's duties."[199] *Shelton* involved sizable trusts created by the patriarch of a large New England fam-

194. *Id.*

195. *Id.* at 802.

196. *Id.* at 803.

197. New Hampshire's approach is noteworthy because the state has created a separate trust court and is becoming known for its trust expertise. *See* Nadine M. Catalfimo & Charles A. DeGrandpre, *Closing the Loopholes: New Laws for "In Terrorem" (No Contest) Clauses in Wills and Trusts*, 52 N.H.B.J. 16, 16 (2011) ("The legislature has made a commitment to be the 'most attractive legal environment ... for trusts and fiduciary services' by making an 'attractive legal and financial environment for individuals and families seeking to establish and locate their trusts and investment assets' to New Hampshire.") (citations omitted); Todd D. Mayo, *New Hampshire Establishes Dedicated Trust Court*, N.H. TR. COUNCIL (Dec. 12, 2013), http://www.nhtrustcouncil.com/2013/12/12/new-hampshire-establishes-dedicated-trust-court/ [http://perma.cc/5NSU-F4PJ] ("In announcing its decision to create the trust court, the judicial branch cited New Hampshire's stature as a leading trust jurisdiction within the nation and the growing trust-related activity that is taking place within the state. With the formation of the trust court, New Hampshire will be the first state in the nation with a specialty court dedicated to complex trust and estate litigation.").

198. 62 A.3d 741 (N.H. 2013) [hereinafter *Shelton Supreme Court*]. The trial court decision can be found at *Shelton v. Tamposi*, 2010 N.H. Super. LEXIS 78 (Aug. 18, 2010) [hereinafter *Shelton Trial Court*]. Betty later brought a malpractice claim against her trustee, the trustee's lawyer, and the lawyer's Chicago-based law firm, alleging that their negligence and other misconduct led to the forfeiture of her interest in the trust assets. *See* Tamposi v. Denby, 974 F. Supp. 2d 51 (D. Mass. 2013) [hereinafter *Shelton Malpractice Action*].

199. *Shelton Trial Court*, 210 N.H. Super. Lexis 78, at *67.

ily to benefit his six children and their respective descendants.[200] The trusts, which were eventually consolidated and referred to as the SAT Sr. Trust,[201] were governed by an agreement that named two of the six children as "investment directors"[202] and named first a corporate trustee and then, through amendments, a presumably independent individual as trustee.[203] The investment directors were responsible for all investment management decisions, and the remaining trustee of each child's trust was responsible for deciding when, and in what amounts, to distribute assets to the beneficiaries.[204] To effectuate the investments, the directors were allowed to hold and manage the undivided interests (consisting primarily of real estate investments but also a sizable stake in the Boston Red Sox), distributing income from those interests and other cash to the separate trusts when they felt it was economically sound to do so. The trustees would then, at their discretion, distribute available funds to the beneficiaries. In other words, the trust agreement split the trust's management function and its distribution function. It was a challenge to this unusual structure—and the respective fiduciaries' powers under it—that resulted in a daughter being disinherited pursuant to a forfeiture clause that prohibited any person from commencing or joining an action seeking to "set aside or declare[ ] invalid or to contest any and all of the provisions included in ... this trust."[205]

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200. *Shelton Supreme Court*, 62 A.3d at 744 ("In its final form, [the trust] specified that after [the settlor's] death, the trust corpus was to be divided into twelve separate trusts for each of his children and their issue (sibling trusts); six trusts contained assets exempt from the federal generation skipping transfer tax and six contained non-exempt assets."). Although the settlor's wife survived him, she was not a beneficiary and in fact was described as a peacekeeper who refused to make tuition payments unless and until a dissenting child reconciled with her siblings. *Shelton Trial Court*, 2010 N.H. Super. Lexis 78, at *25, *35.

201. *See Shelton Supreme Court*, 62 A.3d at 744-45.

202. Neither son received compensation for his trust-related services other than what each received through his work for the family companies. *Shelton Trial Court*, 2010 N.H. Super. LEXIS 78, at *16-17.

203. *Id.* at *2-3.

204. Articles Fifth and Sixth authorized the trustee to "pay to or for the benefit of the child ... such amounts from the net income and principal of the trust and in such proportions among them as the trustee considers necessary for education and maintenance in health and reasonable comfort." *Shelton Supreme Court*, 62 A.3d at 747.

205. *Shelton Trial Court*, 2010 N.H. Super. LEXIS 78, at *7.

The various *Shelton* litigations reveal the type of protracted and expensive litigation that easily could have motivated the patriarch to disinherit altogether the more meddlesome objects of his bounty.[206] The litigation that divested the beneficiary of her interest in the trust and ultimately ended up in the New Hampshire Supreme Court involved a claim that the investment directors, by deciding to retain certain assets, were exceeding their powers and depriving the trustee, charged with distributing assets, of any ability to do her job because she was unable to exercise her discretion to make distributions to serve the beneficiaries' cash needs.[207] Finding that the settlor intended the investment directors to have exclusive and full "power and authority to direct the retention or sale of assets and to direct the purchase of property with any principal cash reserves," the appellate court rejected the beneficiary's claims that the investment directors' decision not to release assets to the trustees was improper.[208] Unfortunately, the appellate court did not opine on whether the forfeiture clause was properly invoked because the beneficiary opted to dismiss her appeal, in favor of a malpractice

206. Commencing in 2000, five years after the settlor's death, two of the six siblings became dissatisfied with aspects of the trust and filed a number of lawsuits, some of which resulted in dismissal, others in mediation, and still others in settlement. *Shelton Supreme Court*, 62 A.3d at 745. A result of these extensive proceedings was that the dissenting beneficiaries were given the option of selecting their own trustees who would decide when those beneficiaries received distributions from their respective trusts. A second result was a magistrate judge's ruling that further lawsuits might trigger the forfeiture clause. Betty, one such beneficiary, had particularly large cash flow needs because of her spending patterns, litigation costs, and messy divorce expenses. *Shelton Trial Court*, 2010 N.H. Super. LEXIS 78, at *14-16. With the help of a prominent Chicago-based estates attorney, Betty tried to engage an institutional trustee but was unsuccessful. *Id.* at *18 ("None of those institutions was willing to act as trustee for the [Betty] Trusts because there was not sufficient cash flow assured to compensate for their services."). She ultimately named Julie Shelton, a long-time friend and litigation attorney, as trustee; Shelton "reluctantly" accepted the appointment, even though she had no experience in trust matters. *Id.* at *18-19. Alleging that Shelton took a vexatious and litigious approach to increasing the assets of Betty's trust from the day she assumed office, without doing a cost-benefit analysis of the litigation or considering the needs of beneficiaries other than Betty, Betty subsequently sued her and her attorneys for legal malpractice, see *Shelton Malpractice Action*, 974 F. Supp. 2d 51, 55 (D. Mass. 2013), a matter that has not yet been resolved. Betty withdrew her direct appeal of the forfeiture action when she filed the malpractice claim. *See id.*

207. *Shelton Trial Court*, 2010 N.H. Super. LEXIS 78, at *40; *see also Shelton Malpractice Action*, 974 F. Supp. 2d at 55.

208. *Shelton Supreme Court*, 62 A.3d at 748.

action in a different forum, and the court found that the trustee lacked standing to contest the forfeiture ruling.[209]

What is really interesting about *Shelton*, though, is the tremendous difficulty that the court, lawyers, and parties to the trust shared in defining the nature of the beneficiary's "contest." The probate court had previously ruled that as long as the beneficiaries "did not attempt to challenge the validity of the trust or authenticity of documents, but sought only to uphold fiduciary standards under the trust and New Hampshire law, the [forfeiture] clause would not be triggered."[210] Following a five-week trial, the court found enough "bad faith" on the part of the beneficiary to support divesting the daughter of her very valuable interest in the trust.[211] In so doing, the trial court acknowledged New Hampshire's policy in favor of respecting settlor intent[212] but characterized the plaintiffs' claims as being grounded in trust design and validity rather than in fiduciary duties.[213] To justify this view, the court observed that the beneficiary and trustee filed their contest too quickly to allow sufficient opportunity to consider the fiduciaries' decision making.[214] On the other hand, the challenge questioned ongoing conduct by the investment directors, which was not fully addressed by the trust instrument, lay within the investment directors' discretion, and presumably would be subject to further discretion as the trust continued to hold and manage property over time. Accordingly, this challenge went to the heart of the trust's administration and therefore is difficult to distinguish from claims involving fiduciary conduct (or misconduct).[215] Unfortunately, the beneficiary's decision to pursue her rights in a different forum meant that the appellate court never reached the substantive issues. The malpractice action

209. *Id.* at 749-50.

210. *Id.* at 745; *see also supra* note 206.

211. *Shelton Trial Court*, 2010 N.H. Super. LEXIS 78, at *70 ("The court finds that in bringing and prosecuting this litigation the petitioners have acted in bad faith.").

212. *Id.* at *69.

213. *Id.* at *72-73 (rejecting petitioners' contention that the "litigation concerns breaches of fiduciary duty by the investment directors" and thus "afford[s] a free pass from the *in terrorem* clause's bite" because "[a]s early as August 2007, petitioners planned to bring litigation concerning the trust, prior to most or all of the breaches alleged in the petition and even prior to introducing the new trustee to the investment directors or the former trustee").

214. *Id.* at *69-73.

215. *See infra* notes 258-61 and accompanying text.

against the trustee and her lawyer who recommended the claim as being within the fiduciary duty exception to forfeiture, remains pending.[216]

These three appellate cases are not the only recent ones that involve broad forfeiture clauses that seek to dissuade beneficiaries from challenging trustee conduct.[217] For a variety of reasons, however, many of these cases ended up not addressing the substantive issue of the clauses' enforceability.[218] The rapidly rising popularity

216. The malpractice litigation is still in discovery; recently the court denied Shelton's motion seeking a temporary restraining order and a preliminary injunction that would have frozen the assets of various lawyers and their firm. *See* Memorandum and Order on the Shelton Claimants' Motion for the Entry of a Temporary Restraining Order and Preliminary Injuction at 15, *Shelton Malpractice Action*, No. 2010-12283 (D. Mass Dec. 23, 2013).

217. *See, e.g.*, Hamel v. Hamel, 299 P.3d 278, 288-89 (Kan. 2013); Commonwealth Bank & Tr. Co. v. Young, 361 S.W.3d 344, 353 (Ky. Ct. App. 2012); Hanselman v. Joseph Frank, No. 09-P-1490, 2010 WL 2507827, at *2 (Mass. Ct. App. June 23, 2010); *In re* Estate of Stan, 839 N.W.2d 498, 500 (Mich. Ct. App. 2013); Rouner v. Wise, 446 S.W.3d 242, 260 (Mo. 2014); Frakes v. Nay, 295 P.3d 94, 100 (Or. 2013); Wilson v. Dallas, 743 S.E.2d 746, 761 (S.C. 2013). Like the cases discussed in the text, *Hamel* acknowledged the validity of a forfeiture clause that disinherited any beneficiary who, among other things, "object[ed] in any manner to any action taken or proposed to be taken in good faith by the Trustee under said trust or any amendment to it." 299 P.3d at 289. The disgruntled trust beneficiary, and sibling to the trustees, had argued that enforcement of the forfeiture clause violated public policy because his original action did not seek to question the validity of the trust instrument but only to interpret and gain information about it. *Id.* at 288. The court responded by explaining that Kansas law, which had long recognized no-contest clauses in wills and found no distinction for trusts, simply applied a two-prong analysis without regard to public policy: whether the beneficiary's actions violated the express language of the clause, however expansive it might be; and whether the beneficiary had probable cause to take those actions. *Id.* at 288-89. Thus, even though the *Hamel* clause threatened to abrogate trustee duties, the court approved the forfeiture clause; the court did not enforce the clause to disinherit this particular beneficiary, though, because it found that the beneficiary had probable cause to mount the challenge. *Id.*

218. Some jurisdictions have implied a willingness to enforce broad forfeiture clauses triggered by challenges to fiduciary decision making, but have not disinherited beneficiaries because of the factual circumstances involved. *See In re* Dugan Revocable Living Tr., No. 60263, 2014 WL 549697, at *1 (Nev. Feb. 10, 2014) (relying on a no-contest clause that allowed disinheritance of "any beneficiary who contested the trust or otherwise interfered with the trust's administration or distribution," trustees sought to disinherit two beneficiaries because the first failed "to promptly provide information regarding some of the trust's assets" and the second made "derogatory remarks towards the Trustees [that] interfered with the trust's administration"; the commissioner appointed by probate court disagreed with trustees' decision to invoke forfeiture clause; the Nevada Supreme Court found commissioner acted properly in reviewing trustees' exercise of discretion but refused to disinherit beneficiaries because their conduct, although annoying, did not interfere sufficiently with the trust's administration); *Frakes*, 295 P.3d at 100-01 (construing a clause triggered by any beneficiary who "contests in any court the validity of this trust or of deceased Trustor's or beneficiary's last will or seeks to obtain an adjudication in any proceeding in any court of this trust, or any

and appearance of these clauses, however, shows that they are filling some need for trust creators.

C. The Uniform Trust Code and the Restatement (Third) of Trusts

Although the Uniform Probate Code has two sections addressing "penalty clauses" in wills, the Uniform Trust Code deliberately has no equivalent for trusts.[219] Apart from Tennessee, described above, states with legislation applicable to trust forfeiture clauses for the most part do not appear to specifically address trust provisions triggered by contests questioning fiduciary conduct.[220]

The fifth "tentative draft" of section 96 of the Restatement (Third) of Trusts, entitled "Exculpatory and No-Contest Clauses," was last revised in 2009 before the cases cited in this Article were decided.[221]

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of its provisions" but refusing to address claim that clause was "void as against public policy and unenforceable" because court found that clause was not triggered where the only person who stood to lose out was the estate planning attorney personally and not the trust). Other courts have construed broadly drafted clauses not to cover fiduciary decision making. *See Young*, 361 S.W.3d at 348, 353 (construing forfeiture clause stating that any beneficiary who "directly or indirectly, attempt[s] to contest or oppose the validity of this agreement, including any amendments thereto, or commences or prosecutes any legal proceedings to set aside this agreement ... forfeit[s] his or her share, cease[s] to have any right or interest in the trust property, and shall be deemed to have predeceased me" and finding that beneficiaries' pleadings, which challenged trustee decision making, did not "seek to invalidate any term in the trust document" but rather sought "construction" of those terms); *In re* Estate of Thomas, 28 So. 3d 627, 638 (Miss. Ct. App. 2009) (affirming trial court's conclusion that the purpose of a broadly worded forfeiture clause was "to discourage the beneficiaries from *contesting the Will*, not challenging the *administration* of the Estate or the Trusts—which is what [the] Complaint does" because "[t]o hold otherwise, would mean that an Executor and/or a Trustee is free to spend a decedent's money *without accountability to anyone*"). And still other courts have interpreted narrow forfeiture clauses expansively to encompass challenges to fiduciary conduct. *See Estate of Stan*, 839 N.W.2d at 504-05 (finding that a challenge to fiduciary appointment and fiduciary misconduct was equivalent to challenging the validity of a document but refusing to disinherit beneficiary who had probable cause to pursue the challenge).

219. UNIF. PROBATE CODE §§ 2-517, 3-905 (UNIF. LAW COMM'N 2010) ("Penalty Clause for Contest"); Challis, *supra* note 127, at 518 ("The Uniform Trust Code contains no specific provision addressing the enforceability of no contest clauses in Trusts. It appears that this decision was intentional, and this provision was omitted after discussion and consideration by the Uniform Laws Commissioners.").

220. *See, e.g.*, DEL. CODE ANN. tit. 12, § 3329 (West 2014); OR. REV. STAT. ANN. § 130.235 (West 2014); *see also* Donkin v. Donkin, 314 P.3d 780, 787-91, 797 n.15 (Cal. 2013) (discussing evolution of California's statute).

221. RESTATEMENT (THIRD) OF TRUSTS § 96 (AM. LAW INST., Tentative Draft No. 5, 2009). The section provides in full as follows:

(1) A provision in the terms of a trust that relieves a trustee of liability for

Section 96, which had no equivalent in the Second Restatement, addresses trust forfeiture clauses in the same provision as it addresses clauses that exculpate trustees from liability, explaining in the general comments that both are "commonly used types of trust provisions" that have the effect of insulating trustees from liability or "from litigation over trust administration."[222] More specifically, section 96(1) enforces such an exculpatory clause so long as it was freely negotiated, applies only to negligent (not bad faith) conduct, and does not relieve the trustee of "accountability for profits" deriving from the breach.[223] Section 96(2) bars enforcement of any forfeiture clause "to the extent that doing so would interfere with the enforcement or proper administration of the trust."[224]

The comments and reporter's notes first describe the reasons for placing both substantive and procedural limits on the enforcement of exculpatory clauses.[225] Complete exoneration of a trustee for misconduct that exceeds negligence, the notes explain, undermines "the definition and essence of a trust as a 'fiduciary relationship'" and arguably renders the trust invalid.[226] Because "a private trust, its

> breach of trust, and that was not included in the instrument as a result of the trustee's abuse of a fiduciary or confidential relationship, is enforceable except to the extent that it purports to relieve the trustee
>
> (a) of liability for a breach of trust committed in bad faith or with indifference to the fiduciary duties of the trustee, the terms or purposes of the trust, or the interests of the beneficiaries, or
>
> (b) of accountability for profits derived from a breach of trust.
>
> (2) A no-contest clause may not be enforced to the extent that doing so would interfere with the enforcement or proper administration of the trust.

Id. No comparable provision appeared in the Restatement (Second) of Trusts. *Id.* (reporter's notes).

222. *Id.* § 96 cmt. a.

223. *Id.* § 96(1).

224. *Id.* § 96(2).

225. *See supra* notes 104-09 and accompanying text.

226. RESTATEMENT (THIRD) OF TRUSTS § 96 cmts. b-c, reporter's notes (AM. LAW INST., Tentative Draft No. 5, 2009) (quoting *id.* § 27(2) and UNIF. TRUST CODE § 404 (UNIF. LAW COMM'N 2006)); *see also* BOGERT ET AL., *supra* note 13, § 973 (A settlor "who attempts to create a trust without any accountability in the trustee is contradicting himself. A trust necessarily grants rights to the beneficiary that are enforceable in equity.... [If] the settlor really intended [to create] a trust, it would seem that accountability ... must inevitably follow"); David Hayton, *The Irreducible Core Content of Trusteeship*, *in* TRENDS IN CONTEMPORARY TRUST LAW 47, 58-61 (A.J. Oakley ed., 1996); Langbein, *supra* note 3, at 1123-25; Leslie, *supra* note 94, at 2752 ("[C]lassic fiduciary rules" that evolved over time "to compensate for information asymmetries and market imperfections" should not be weakened by statute in order to accommodate nonprofessional trustees, because courts already offer them "adequate protection" without such

terms, and its administration must be for the benefit of its beneficiaries," courts, legislatures, scholars, and other commentators have agreed that trustees cannot be exculpated from meeting certain standards of liability.[227] The procedures required to enforce an exculpatory clause ensure this result, for example, by placing the burden of establishing validity of the clause on the trustee as the party with superior knowledge and sophistication; the trustee must show that the settlor wanted to include the exculpatory clause in order to shield the trustee from unnecessary and vexatious claims of negligence by the beneficiaries.[228] If the clause satisfies both the substantive and procedural standards, then it will be enforced.

In contrast to this balanced approach toward exculpatory clauses, which considers how the provision came to appear in a particular trust instrument, the Restatement imposes an absolute prohibition on forfeiture clauses that purport to disinherit beneficiaries who contest fiduciary decision making.[229] In support of this ban, the Restatement refers to public policy and the same rationales applied to exculpatory clauses.[230] The comments further explain that this rule "ordinarily" makes an otherwise valid no-contest clause "unenforce-

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legislation); Leslie, *supra* note 92, at 106-07 ("Although ... [most] courts routinely announce that exculpatory clauses are enforceable, in reality, courts tend to shield the trustee from liability only in four situations: ... (2) the trustee is a non-professional or uncompensated; (3) the [provision relates to a] ... direction that the trustee retain specific, relatively risky investments.").

227. RESTATEMENT (THIRD) OF TRUSTS § 96 cmts. b-c, reporter's notes (AM. LAW INST., Tentative Draft No. 5, 2009) (quoting *id.* and UNIF. TRUST CODE § 404 (UNIF. LAW COMM'N 2006)) (internal quotation marks omitted).

228. Factors to be considered in determining "whether an exculpatory clause was included in the trust instrument as a result of an abuse of a fiduciary or confidential relationship" may include:

> whether the instrument was drawn by the trustee or another acting wholly or in part on behalf of the trustee; whether the trustee prior to or at the time of the trust's creation had been in a fiduciary relationship to the settlor, such as by serving as the settlor's conservator or as the settlor's lawyer in providing the trust instrument or relevant part(s) of it; whether the settlor received competent, independent advice regarding the provisions of the instrument; whether the settlor was made aware of the exculpatory provision and was, with whatever guidance may have been provided, able to understand and make a judgment concerning the clause; and the extent and reasonableness of the provision.

Id. § 96 cmt. d.

229. *Id.* § 96 cmt. e.

230. *Id.*

able to prevent or punish" a beneficiary who sues if the clause "would inhibit beneficiaries' enforcement of their rights under a trust (whether created by the will or other instrument) or would otherwise undermine the effective, proper administration of the trust."[231] The reporter's notes justify blanket nonenforcement by rationalizing that actions to enforce trustee duties often effectuate settlor intent and so are not "contests" but are more in the nature of construction proceedings.[232] What neither the text of the ban nor the accompanying comments address—and what becomes clear from clauses in the newer cases like *Shaheen*, *Peck*, *Bradley*, and others—is that settlors are using express language to manifest just such intent that any beneficiary who disagrees with trust management and trustee decision making loses her inheritance.[233] It is thus disingenuous at best to cite "settlor intent" as the reason for a rule barring enforcement of these clauses.

Although Section 96(2) makes no distinction between contests that have merit and those that do not, the reporter's notes recognize that there will be the "occasional" case when the settlor "is concerned that certain disappointed or difficult beneficiaries might pursue unwarranted and unreasonable litigation against a trustee."[234] In response to these "extreme circumstances," the notes recognize, courts might either "assess litigation costs" or enforce the forfeiture clauses.[235] Thus, like other Restatement provisions that contradict a rule's clear directive with a conflicting explanation, the

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231. *Id.* The comment goes on to list the types of actions that would not "ordinarily" trigger forfeiture, including:

> a beneficiary's petition for instructions (§ 71, even though, for example, it seeks an interpretation contrary to the trustee's interpretation ...); a demand for or challenge to a trustee's accounting (§ 83); a suit to enjoin or redress a breach of trust (§ 95); a petition for removal of a trustee for unfitness or for repeated or serious breach of trust (§ 37); a suit alleging that a trustee's particular exercise of discretion or even "absolute" discretion constituted an abuse of discretion (§ 87); or the like.

Id. Provisions that would give rise to forfeiture, the comments state, are addressed "comprehensively" in section 8.5 of the Restatement (Third) of Property: Wills and Other Donative Transfers. *Id.*

232. *Id.* § 96 cmt. e, reporter's notes.

233. *Id.*; *see supra* notes 124-28, 139-64, 174-96 and accompanying text.

234. RESTATEMENT (THIRD) OF TRUSTS § 96 cmt. e, reporter's notes (AM. LAW INST., Tentative Draft No. 5, 2009).

235. *Id.*

notes and comments reverse the text.[236] To temper this confusing guidance, the Reporter recommends that enforcement of forfeiture clauses that question fiduciary conduct should occur only when actions by a beneficiary "are so frivolous and burdensome that the court can reasonably conclude that unwarranted harassment is involved and that the forfeiture will enhance rather than impair proper administration and will better protect the interests of the other beneficiaries."[237]

IV. MUST TRUST FORFEITURE CLAUSES FORFEIT TRUST?

As Part III makes clear, settlors appear increasingly likely to include forfeiture clauses in their trust agreements. To date, drafters, courts, legislatures, and reformers have not paid much attention to these clauses, assuming that they would function like their testamentary counterparts. But the differences between how trusts and wills operate mean that trust forfeiture clauses are fundamentally different than their narrower testamentary counterparts. This Part proposes a way to treat trust forfeiture clauses to preserve settlor intent without forfeiting fiduciary accountability. Because so many of the cases described in this Article resulted from aggressive estate planning, estate planners must think about how and when it is appropriate to use trust forfeiture clauses rather than just including them in trust agreements as the latest variety of drafting defaults. Accordingly, this Part first argues that not every trust should contain a forfeiture clause because the goals that property owners are seeking to achieve often are not served, and even may be undermined, by these seemingly innocuous provisions. Second, courts and legislatures should consider an approach to these clauses that balances the need to keep trustees accountable, as seen in the public policy cases, against the property owner's interest in discouraging claims by litigious beneficiaries, as seen in the forfeiture

236. *See* JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 10-5 (Teacher's Manual 2013) ("This is yet another example of a regrettably common structure in [the Restatement (Third)] whereby the rule is X unless it is not X."); *cf.* Leslie, *supra* note 94, at 2751 (describing how UTC comments "gut the protections provided for by the Code's black letter").

237. RESTATEMENT (THIRD) OF TRUSTS § 96 cmt. e, reporter's notes (AM. LAW INST., Tentative Draft No. 5, 2009).

cases. The final Section of this Part therefore uses the text and comments of the draft Restatement to propose procedural safeguards that would allow trust forfeiture clauses, like exculpatory clauses, to be enforced, but only in certain narrow circumstances.

A. Drafting Considerations

The most obvious reaction to reading recent trust forfeiture cases is that including a broad forfeiture clause in estate planning documents as a protective measure may increase, rather than diminish, the likelihood of litigation. Drafters should avoid including such clauses as boilerplate in every estate planning document and instead should seek to determine the precise problem that the settlor is anticipating and hoping to prevent. Although the settlor may desire to shield her chosen fiduciaries from having to spend time and trust resources defending their conduct, that intent may not extend to opportunist fiduciaries (or even lazy ones). The planner should therefore determine whether the settlor is motivated by a general apprehension of any litigation at all, a stubborn belief in the absolute discretion of her fiduciaries, or a desire to moderate between the discretion afforded to the fiduciaries and the good faith and judgment of the beneficiaries and their advisors.[238] Expressing in the trust agreement, or even in a memorandum of guidance to the trustee, how and when to apply and enforce the forfeiture clauses would be helpful.[239]

If a settlor is motivated by one or more particularly meddlesome or litigious beneficiaries with "a tendency to behave irrationally," there are more effective and less controversial ways to plan for such a beneficiary than using a broad forfeiture clause.[240] For example, the settlor might consider funding a separate trust for that benefi-

238. *See* Challis, *supra* note 127, at 502-05.

239. *See* Deborah S. Gordon, *Letters Non-Testamentary*, 62 U. KAN. L. REV. 585, 592-93 (2014); Gordon, *supra* note 20, at 382.

240. Leslie, *supra* note 92, at 102; *see also* Browder, *Re-Examined*, *supra* note 10, at 329 ("The inveterate trouble-maker, who all too often will emerge with petty and frivolous contentions to incite family animosities and waste his benefactor's estate at no risk of personal loss, remains to be dealt with."); Leavitt, *supra* note 6, at 65-66 (describing how forfeiture clauses may be more likely to dissuade those with real claims and less likely to deter "litigious troublemakers").

ciary and allowing her to serve as trustee, or co-trustee, of that trust so that she is involved in the decision-making processes herself. Trustee selection, too, is essential to avoiding conflict. Naming a family member who has natural antipathies towards particular beneficiaries or a professional who has had more interaction with "favored" beneficiaries will increase the likelihood of litigation and should be avoided. Drafters also might include a mediation clause in the trust agreement,[241] or require a beneficiary to pay any costs associated with trust litigation rather than allowing them to request that those costs be paid by the trust.[242] Finally, if the jurisdiction is one that allows (or does not reject) expansive forfeiture clauses directed at contests other than those concerning document validity, at the very least the clause should address (and therefore put the beneficiary on notice about) whether forfeiture still kicks in if the beneficiary's challenge succeeds but the document otherwise stands.[243]

B. A Proposal for Enforcing Trust Forfeiture Clauses: Using Exculpatory Clause Law as a Model

Rather than prohibiting enforcement of trust forfeiture clauses altogether, as the text of the current draft Restatement,[244] Tennessee statute,[245] and public policy cases[246] do, courts and legislatures might instead look to existing law governing exculpatory clauses for guidance about how to adopt a more balanced approach. It is no surprise that the Restatement deals with these two types of clauses in a single section because, although they serve somewhat different goals and thus are not perfect substitutes for each other,[247] both ex

241. *See* Love & Sterk, *supra* note 10, at 569-71 (discussing how mediation clauses, like forfeiture clauses, decrease litigation and publicity but have the added advantages of raising less suspicion from courts while applying to broader categories of disputes).

242. *See* BOGERT ET AL., *supra* note 13, § 871 n.55 (noting examples of circumstances under which courts have required beneficiaries to pay costs associated with trust litigation).

243. *See supra* note 29.

244. *See supra* Part III.C.

245. *See supra* notes 167-72 and accompanying text.

246. *See supra* notes 134-66 and accompanying text.

247. Exculpatory clauses do not provide the beneficiary with the same incentive to forgo litigation that a forfeiture clause does. If a trust contains an exculpatory clause but not a forfeiture clause, a contestant's risk is less because she will not lose her beneficial interest by

culpatory clauses and trust forfeiture clauses are intended to make a fiduciary's job smoother (and more desirable) and both impact trustee accountability.[248] By refusing to enforce exculpatory clauses unless they meet substantive and procedural guidelines, courts are able to balance a settlor's desire to shield her trustee against the beneficiaries' interests in policing that trustee's conduct.[249]

Substantively, courts should view forfeiture clauses that apply to fiduciary conduct with caution, recognizing that these clauses differ from traditional forfeiture clauses that apply to document validity. In fact, for the reasons set forth in the public policy cases, any forfeiture that purports to disinherit a beneficiary who challenges trustee decision making should be presumed invalid, but the inquiry should not simply end there. Although the Restatement prohibits forfeiture clauses that are triggered by such challenges, it recognizes, albeit only in the notes and comments, that certain extreme behaviors by overly litigious beneficiaries should nevertheless result in forfeiture.[250] Incorporating this hidden recognition into the rule by using a burden-shifting approach would better meet the competing interests of settlor, trustee, and beneficiaries.[251] In other words,

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filing the contest. Her only risk is that she ultimately may be unable to recover damages from the trustee, thereby wasting the beneficiary's time and the trust's resources. This risk, however, is the same risk attendant to any litigation.

248. *See supra* note 222 and accompanying text.

249. *See supra* notes 102-09, 222-28 and accompanying text; *see also* Leslie, *supra* note 94, at 2746-52.

250. *See supra* notes 234-37 and accompanying text. Indeed, even jurisdictions that refuse on public policy grounds to enforce forfeiture clauses triggered by challenges to fiduciary conduct still recognize the valid interest in preventing vexatious litigation. *See, e.g.*, Donkin v. Donkin, 314 P.3d 780, 788 (Cal. 2013) ("[N]o contest clauses are still supported by a number of important public policy interests, including respecting a transferor's ability to control the use and disposition of his or her own property and to avoid the cost, delay, public exposure, and additional discord between beneficiaries involved in litigation over the transferor's estate plan."); Di Portanova v. Monroe, 402 S.W.3d 711, 715 (Tex. App. 2012) ("*In terrorem* clauses are designed to dissuade beneficiaries from filing vexatious litigation, particularly as among family members, that might thwart the intent of the grantor.").

251. Professor David Horton agrees that procedural considerations are important and has proposed an alternative approach to trust law generally, and to no-contest clauses in particular, by suggesting that courts apply the contractual concept of "unconscionability" to determine whether a no-contest clause should be enforced. Horton, *supra* note 10, at 1732-34. He explains that unconscionability, unlike the "public policy rule," "would interject procedural considerations into the analysis," allowing courts to uphold clauses that reflect a property-owner's "strongly felt" and "case-specific" preferences. *Id.* at 1734. Although he specifically exempts "no-contest clauses that apply to breach of trust allegations and thus require unwa-

a reviewing court would allow the trustee (or any other party who has an interest in the trust) to rebut the presumption of invalidity by proving that (a) the settlor included the clause to address a particular concern, rather than simply as boilerplate and (b) the purpose for which the clause was included is, in fact, occurring.[252] As is true for exculpatory clauses, imposing this burden on the trustee, who often has superior knowledge and sophistication, helps protect the beneficiaries.[253] Once the party hoping to enforce the forfeiture clause has fulfilled these procedural requirements, however, the burden would then shift back to the beneficiary to prove that she had "probable cause" to challenge the trustee's decision making.[254] In practice, a settlor who anticipated that a particular beneficiary (or class of beneficiaries) might contest a fiduciary's decision making would be expected to so indicate, either in the forfeiture clause or otherwise;[255] if the trustee could show that the beneficiary or beneficiaries had complained in the past, as, for example, what happened (repeatedly) in *Shelton*,[256] the court would apply the expansive forfeiture clause to sever the complaining beneficiary's interest unless the beneficiary proved that she had probable cause to challenge the trustee's decision making or, alternatively, unless the beneficiary prevailed and showed that the trustees had violated one or more duties.

Although this burden-shifting approach is admittedly more complex than a complete rejection or approval of a trust forfeiture clause, it has three main advantages over those more simplistic analyses: first, it acknowledges all of the interests involved in the trust relationship, including those of settlor, trustee, and beneficiaries; second, it accounts for the trust parties' ongoing interactions; and third, it provides greater predictability.

First, the burden-shifting approach described above recognizes the traditional rationales for enforcing forfeiture clauses: incentiviz-

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vering adherence to the trustee's decisions," *id.*, an unconscionability approach could apply equally effectively to that category of contests.

252. Although the appropriate standard of proof is important to consider, that issue is a subject for another day.

253. *See supra* note 228 and accompanying text.

254. *See supra* notes 52-61 and accompanying text.

255. *See supra* note 239 and accompanying text.

256. *See supra* notes 197-216 and accompanying text.

ing harmony and ensuring compliance with the property owner's donative intent.[257] Moreover, it recognizes that forfeiture clauses of any type give the beneficiaries some degree of power and choice over their property, which is more than the beneficiaries would have had had they been disinherited altogether.[258] Finally, by imposing limits on the enforceability of these clauses, this approach recognizes that trusts only function well when "faithless fiduciaries" are subject to oversight.[259] In this way, it also serves the property owner who is unlikely to have placed the property in trust in the first place had she not wanted to impose some level of fiduciary duties on the trustee.[260]

Second, this approach takes into account the trust parties' ongoing interactions. In contrast to forfeiture clauses directed at document validity, forfeiture clauses that apply to fiduciary decision making can be triggered at any time during the life of the trust, including many years after the trust comes into existence. If a forfeiture clause applies without any procedural safeguards, a beneficiary risks her inheritance every time she questions whether a trustee has responded appropriately to changes in circumstances that the settlor could not have anticipated.[261] Consider the contestants in *Shaheen*[262] and *Peck*[263] whose beneficial interests in their respective trusts were terminated the first time they called into question their respective trustees' conduct. In *Peck*, this result ensued regardless of outcome, and in *Shaheen*, it ensued notwithstanding the existence

257. *See supra* notes 30-37 and accompanying text; *see also* Engelhardt, *supra* note 10, at 542 (describing reasons for forfeiture clauses, including "protect[ing] the grantor's wishes," "avoid[ing] litigation," and "plac[ing] an absolute limit on a beneficiary's interest in assets").

258. *See* Browder, *supra* note 4, at 1074 ("[I]f a testator is willing to trust the judgment and integrity of his executors in the management of his estate and to free them from responsibility to his beneficiaries, that too should be his privilege. Any conditions inserted to compel the beneficiaries to respect his wishes should be enforced."); Leslie, *supra* note 92, at 102 (noting that use of forfeiture clauses in trusts to deter beneficiaries from mounting "nuisance suits ... might be criticized for its potential to deter meritorious suits" but explaining that "at least a no-contest clause preserves some incentive for a trustee to exercise reasonable care").

259. Bradley v. Gilbert, 91 Cal. Rptr. 3d 680, 688 (Ct. App. 2009).

260. On occasion, trustees may use these clauses as swords, rather than shields, an approach that does not serve the settlor's interest in avoiding litigation. *See, e.g.*, *In re* Dugan Revocable Living Tr., No. 60263, 2014 WL 549697 (Nev. Feb. 10, 2014).

261. For a discussion of trustee discretion, see generally Halbach, *supra* note 96, and Krasilovsky, *supra* note 95.

262. *See supra* notes 174-84 and accompanying text.

263. *See supra* notes 185-96 and accompanying text.

of other meritorious claims. The burden-shifting approach is unlikely to lead to forfeiture the first time a beneficiary complains. Thus, a clause like the one in *Bradley*,[264] which was designed to cut off challenges by children who might resent their father's shifted affections, would not result in forfeiture; the property owner's desire to control potentially meddlesome beneficiaries and insulate his legacy would give way to the recognition that fiduciary duties, and the beneficiary's right to enforce them, are essential to trust relationships.[265]

Third, the burden-shifting approach would provide notice to the beneficiaries and their advisors of the potential risks of litigation, thereby solving another problem, which arose in the *Shelton* case, concerning the difficulty of predicting when a challenge involves fiduciary conduct as opposed to construction of a trust's terms.[266] Recall that the *Shelton* forfeiture clause expressly did not apply to challenges to fiduciary conduct.[267] The trust beneficiary's argument was that the trust's "investment directors" were acting improperly by not releasing trust assets to the trustees, because that decision meant that the investment directors, rather than the trustees, controlled trust distributions.[268] The New Hampshire trial court held that the challenge triggered the forfeiture clause, reasoning that the beneficiary was contesting the terms of the document, rather than trustee decision making, because she brought the challenge before the investment directors had actually made many decisions.[269] In fact, though, the hierarchy and relationships among the fiduciaries, and the decisions that drove those relationships, were precisely the point of contention. That this argument involved the terms of the document, rather than fiduciary conduct, would have been difficult for any advisor to predict and ultimately led to a second layer of litigation, including a malpractice action against

264. *See supra* notes 138-61 and accompanying text.
265. *See supra* notes 100-03 and accompanying text.
266. *See supra* notes 207-16 and accompanying text.
267. *See supra* note 199 and accompanying text.
268. *See supra* notes 198-216 and accompanying text.
269. *See Shelton Trial Court*, No. 316-2007-EQ-2109, 2010 N.H. Super. LEXIS 78 at *69-73 (Aug. 18, 2010); *see also In re* Estate of Stan, 839 N.W.2d 498, 504-05 (Mich. Ct. App. 2013) (finding challenge to fiduciary appointment equivalent to challenge to validity of the document or one of its terms but refusing to disinherit beneficiary because she had probable cause to object to sister's appointment and subsequent conduct).

the trustee and the attorney who had reached the wrong conclusion and caused the client to lose her multi-million dollar legacy.[270] Conversely, consider the conduct being challenged in *Bradley*, which just as easily could have been styled as a challenge to the terms of the rewritten survivor's trust, rather than to the trustee's conduct, and possibly would have survived.[271] Allowing forfeiture clauses triggered by challenges to trustee conduct, but imposing strict procedural guidelines on the clauses' enforceability, would help avoid this problem.

In short, any well-reasoned approach to trust forfeiture clauses cannot simply equate them with traditional forfeiture clauses and blindly apply the same analysis. Using a more balanced, albeit more complex, approach acknowledges the essential component of trust law that enables a beneficiary to keep her trustees accountable but also provides a procedure by which forfeiture clauses would serve their goal of making beneficiaries carefully consider the downsides of litigation.

CONCLUSION

Whatever can be said about the forfeiture clauses that appear in the recent cases discussed in this Article, each clause reflects the respective trust creator's desire to confer a legacy of sustained, functioning, and non-litigious interactions among the parties to the trust relationship. In other words, these increasingly popular clauses are evidence of property owners' continuing distaste for lawsuits that not only drain precious assets from the settlors' legacies but also disrupt ongoing family relationships and expose those relationships to the public. Courts, legislatures, and planners struggle with balancing these legitimate goals against the trust beneficiaries' (and inheritance system's) obligation to police trustee conduct—not to forfeit the very trust reposed in these fiduciaries. Recognizing these compelling interests and striking a balance between them requires attention not only from those people responsible for designing the documents but also from those responsible for their administration, including courts and legislatures.

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270. *See supra* notes 198-216 and accompanying text.
271. *See supra* notes 138-61 and accompanying text.