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Evan J. Shaheen
Notre Dame Law School

IN TERROREM CLAUSES: BROAD, NARROW, OR BOTH?

*Evan J. Shaheen**

INTRODUCTION

In her 1867 novel, *The Children of Mount Ida: And Other Stories*, Lydia Maria Child described a man struggling to mobilize his donkey. The man was at a loss. Despite his best efforts in whipping the animal, it refused to move.[1] It was only after a neighbor hung turnips on a stick in front of the donkey that he set off "on a brisk trot, in hopes of overtaking them."[2] Like the man in the novel, modern estate planners have struggled to find a way to "whip" potential contests to their clients' plans without also providing a "turnip." The response to this problem from the modern estate-planning community has predominantly been the use of an "*in terrorem*" or "no-contest" clause. Inherent in this strategy is the "carrot and stick" or "turnip and whip" approach.[3]

While the idea of the "carrot and stick" seems simple in theory, *in terrorem* clauses are governed by state law, with their application varying in large part by jurisdiction. Nevertheless, this Note seeks to identify some of the broad principles on which many *in terrorem* clauses rely, while also delineating several of the different state law approaches thereto. It does this by describing some of the potential problems with *in terrorem* clauses and posing potential solutions in the context of a variety of state law jurisprudence.[4]

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1 LYDIA MARIA CHILD, THE CHILDREN OF MOUNT IDA, AND OTHER STORIES 156 (New York, Charles S. Francis 1871).

2 *Id.*

3 *See, e.g.*, Kara Blanco & Rebecca E. Whitacre, *The Carrot and Stick Approach: In Terrorem Clauses in Texas Jurisprudence*, 43 TEX. TECH L. REV. 1127, 1128–29 (2011) (describing the use of the "carrot and stick" approach).

4 Because of the expansive and varying nature of the law surrounding *in terrorem* clauses, this Note does not seek to provide a comprehensive analysis of each state's approach to them or their applicability in every potential situation; rather, it seeks to identify potential problems arising from some of the general principles surrounding such clauses.

This Note will first address what will be defined as the "puppet problem."[5] By drafting *in terrorem* provisions that purport to cut out only the *contestant* and not the contestant *and his or her descendants*, however, planners expose their clients to the puppet problem. There are many instances in which a testator or settlor will amend his plan, leaving his grandson with substantially less than in the previous plan, and omitting his son (the grandson's father) from the amended plan completely. The son still has standing to contest the plan, but under the amended plan, nothing to lose. Consequently, the grandson can use the son as a "puppet" to contest the amended plan in hopes of getting the original plan's distribution reinstated, while also avoiding forfeiture under the amended plan. By drafting and permitting provisions that preclude a distribution to the son *and his descendants*, planners and judges can not only prevent the "puppet problem" but also make the contestant think twice about a contest, even absent a substantial distribution.

On the basis that *in terrorem* clauses be enforced against contestants and their descendants, this Note next argues that planners should take great care to draft *in terrorem* clauses to ensure compliance with jurisprudence in the state in which they practice. In those states where the law is favorable to the validity of *in terrorem* clauses, practitioners should offer them to their clients routinely. Even if there is no perceived "black sheep" who might contest the will, clients may well opt for the deterrence benefits of the clause as it affects all named beneficiaries.[6] In today's litigious society, adopting such precautions may appeal to many clients. In fact, they may choose to establish trusts in jurisdictions favorable to upholding *in terrorem* clauses, either through the use of a trustee situated in that state or by other means.[7] In all cases, ensuring that a client's *in terrorem* clause complies with state law will be of even greater importance as the clause purports to effectuate forfeiture of more than just the contestant.

Finally, once planners and lawmakers have worked together to improve *in terrorem* clauses in these ways, this Note maintains that their utility will stretch to other nonprobate assets beyond wills and trusts. Indeed, because individual retirement accounts (IRAs) and insurance policies already purport to preclude a distribution to a beneficiary for reasons such as undue influence or fraud of the policymaker, there is no reason that the same should not apply for failed contests involving these assets. The use of *in terrorem* clauses with other nonprobate assets will consequently be a direct benefit of their improved utility.

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5 This is the traditional "carrot and stick" approach.

6 *See* Peter G. Billings, Note, *Infants and In Terrorem Clauses: Rethinking New York Estate Powers and Trusts Law Section 3-3.5*, 22 QUINNIPIAC PROB. L.J. 397, 397–98 (2009) ("A common tool used to deter a will contest is an in terrorem clause.").

7 Sullivan v. Kodsi, 836 N.E.2d 125, 131 (Ill. App. Ct. 2005) ("In determining where a trust is administered . . . courts consider the provisions of the trust instrument, the residence of the trustees, the residence of its beneficiaries, the location of the trust assets, and the location where the business of the trust is to be conducted.").

Part I of this Note thus describes the necessary background on which arguments for *in terrorem* clauses stand. Section II.A describes to whom *in terrorem* clauses should apply to avoid the "puppet problem" and maximize the effectiveness of the "carrot and stick" approach. Section II.B focuses on *claims* to which *in terrorem* clauses should apply in order to comport with modern state jurisprudence. Section II.C of this Note concludes with potential ways in which *in terrorem* clauses, when drafted effectively, can be useful to planners in novel contexts, such as life insurance policies and IRAs.

I. BACKGROUND: THE HISTORY AND POLICY OF *IN TERROREM* CLAUSES

Scholars regard estate planning as one of the oldest persisting areas of the law today.[8] The origin of wills likely precedes the idea of written communication.[9] Because of this deep history, many of the practices of modern estate planning, including the use of *in terrorem* clauses, originate from early civilization. It is therefore important to understand this history in order to understand the modern issues around *in terrorem* clauses and how they can be resolved.

Like estate-planning law generally, the use of *in terrorem* clauses dates back as early as 2200 B.C.[10] From that time, *in terrorem* clauses were used consistently, often threatening that in the event of an alteration of the will in question, "God's grace and his eternal reward [would] be taken from him for ever."[11] As evidenced by this clause, the influence of the Catholic Church was heavily implicated in *in terrorem* clauses. In fact, because of the Catholic Church's great interest in obtaining property during medieval times, churchmen prioritized the Church as a beneficiary in their wills.[12] Seeking to ensure protection of the succession of property to these institutions, testators often invoked *in terrorem* clauses that make the modern *in terrorem* clause look "tame."[13] *In terrorem* clauses continued to evolve under English rule. Specifically, the unwieldy threats made applicable to any contestant in medieval

8 *See* Timothy W. Floyd et al., *Beyond Chalk and Talk: The Law Classroom of the Future*, 38 OHIO N.U. L. REV. 257, 293 (2011); Chad R. Baker, *Ohio Estate Tax Repeal: The End or Just the Beginning? Unlocking Opportunities After Repeal*, 22 OHIO PROB. L.J., no. 2, 2011, at NL 6.

9 Floyd et al., *supra* note 8, at 293 n.201 (citing ALISON REPPY & LESLIE J. TOMPKINS, HISTORICAL AND STATUTORY BACKGROUND OF THE LAW OF WILLS, DESCENT AND DISTRIBUTION, PROBATE AND ADMINISTRATION 2 (1928)).

10 Gerry W. Beyer et al., *The Fine Art of Intimidating Disgruntled Beneficiaries with* In Terrorem *Clauses*, 51 SMU L. REV. 225, 230–31 (1998). Beyer et al. note that the use of *in terrorem* clauses may have been invoked during biblical times, when God commanded to Adam that "[f]rom every tree of the garden you may eat; but from the tree of the knowledge of good and evil you must not eat; for the day you eat of it, you must die." *Id.* at 230 (quoting *Genesis* 2:16–17).

11 *Id.* at 232.

12 Malcolm A. Moore, Lecture, *The Origin of Our Species: Trust and Estate Lawyers and How They Grew*, 32 ACTEC J. 159, 160–61 (2006).

13 *Id.* (quoting an *in terrorem* clause that threatened to shut a contestant "out of the gathering of all the holy ones on Doomsday; and [take him to] Satan").

times began to take on a more confined character. In *Powell v. Morgan*,[14] the English High Court of Chancery refused to apply forfeiture of a bequest to a contestant because the contest was made with *probabilis causa litigandi* (probable cause).[15] The character of the clause changed as well. Where threats of satanic terror in the afterlife were thought to preclude contests in medieval times, seventeenth-century provisions catered to a more materialistic society by specifically threatening forfeiture of bequests.[16] Centuries later, the United States Supreme Court would weigh in on *in terrorem* clauses in *Smithsonian Institution v. Meech*.[17] Writing on behalf of the Court, Justice David Brewer distinguished between legacies given to persons "upon conditions not to dispute the validity of, or the dispositions in wills or testaments," which were "*in terrorem*," and cases in which the acquiescence of the legatee appears to be a material ingredient in the gift, which "assume[d] the character of a conditional limitation."[18] Citing *Powell*, Justice Brewer suggested that the presence of "*probabilis causa litigandi*" with respect to the former of these will result in the "non-observance of the conditions."[19] Justice Brewer went on to suggest the reason for this limitation, explaining:

> A court of equity does not consider that the testator meant such a clause to determine his bounty, if the legatee resorted to such a tribunal to ascertain doubtful rights under the will, or how far his other interests might be affected by it; but merely to guard against *vexatious* litigation.[20]

The historical underpinnings briefly examined in these cases present two prevalent themes that will appear in this Note. First, as far back as *Powell* in 1688, trust and estate law has been applying *in terrorem* clauses to a varying number of claims.[21] As this Note will illustrate, state laws continue to apply

14 Powell v. Morgan (1688) 23 Eng. Rep. 668, 668 (Ch.).

15 *Id.*; *see also* Robert M. Kincaid, Jr., *In Terrorem Clauses and Arbitration Clauses in Wills and Trusts in Ohio*, 27 OHIO PROB. L.J., no. 1, 2016, at NL 2 (describing *Powell* as possibly the first case regarding *in terrorem* clause enforceability).

16 *See* Cooke v. Turner (1846) 153 Eng. Rep. 1044, 1044; 15 M. & W. 727, 728 (permitting a no-contest clause that sought to exclude any contestant of the will from the "use and disposition hereinbefore contained, for the raising and payment, during the life of my said daughter, . . . of the aforesaid yearly sum of £2000, . . . of the rents and issues and profits of my estate hereinbefore devised, and also the liberty of residing in my said mansion-house, and all other benefits hereby given to or in trust for my said daughter, or derivable by her under this my will, and in lieu thereof I devise . . . the yearly sum of £300 only"). This case is thought to be one of the earliest decisions "declaring a forfeiture based upon a beneficiary's post-testamentary conduct." Beyer et al., *supra* note 10, at 237.

17 169 U.S. 398 (1898). The phrase in the will at issue in this case read: "These bequests are all made upon the condition that the legatees acquiesce in this will and I hereby bequeath the share or shares of any disputing this will to the residuary legatee hereinafter named." *Id.* at 399.

18 *Id.* at 413.

19 *Id.*

20 *Id.* (emphasis added).

21 While *Powell* refused to apply *in terrorem* clauses to claims brought with probable clause, this Note examines several statutory schemes that refuse to apply *in terrorem* clauses to other types of claims as well. *See infra* Section II.B.

in terrorem clauses with such variation. Second, as shown in the *in terrorem* clauses at issue in the cases above, there was a change in what kind of "carrot" testators were using to deter potential contestants. With the societal shift over time from a strong emphasis on religion toward a more materialistic mindset, *in terrorem* clauses changed as well. The threat of consequences in the afterlife was no longer sufficient to deter contests. Accordingly, testators began to threaten deprivation of the bequest to the beneficiary upon the occurrence of a contest. This Note will argue that it is again time for a change. As family dynamics and relationships continue to rapidly evolve throughout the twenty-first century, so too must the use of *in terrorem* clauses. In today's litigious society, planners should seek to use *in terrorem* clauses to apply to the broadest number of claims permissible under the state law in which they practice, thereby potentially minimizing the potential for future litigation.[22]

Like many doctrines, the law of trusts and estates has built its foundation not only on history but also on public policy. While difficult to define, the policies implicated to guide courts in making decisions about *in terrorem* clauses should involve matters "that affect[ ] society at large rather than the litigants' purely personal or proprietary interests."[23] Moreover, while determinations about public policy are ordinarily the province of the legislature, the "courts may find something to be against public policy if it is 'clearly injurious to the interests of society.'"[24] Courts consequently rely on a set number of public policy considerations in determining the validity of an *in terrorem* clause. These considerations include a balancing of the interests of the testator (including the primacy of the testator's intent, minimization of litigation, and practicality of the *in terrorem* clause) with the interests of the beneficiary (such as avoiding the probate of wills procured by wrongdoing and the law's dislike for forfeitures). Finding the proper balance of these policy considerations is the main mechanism whereby courts decide the proper form of *in terrorem* clauses. This Note will analyze each in turn.

Although courts must strike a balance among the aforementioned policy considerations, courts in numerous jurisdictions have articulated the necessity of maintaining the primacy of the testator's intent above all other considerations. After all, "[i]f the testator wanted [a certain testamentary scheme], [the] testator would have used the appropriate language to reflect that intention."[25] Adopting a similar approach with respect to *in terrorem* clauses, the court in *Estate of Strader* analyzed an *in terrorem* clause, giving primary defer-

22 76 AM. JUR. 2D *Trusts* § 267 (2020) ("[A] no contest clause that is extremely broad evidences a purpose on the part of the settlor to expansively prohibit any attempt to set aside any provision of a trust.").

23 Tunstall v. Wells, 50 Cal. Rptr. 3d 468, 474 (Ct. App. 2006).

24 *Id.* (quoting Md. Cas. Co. v. Fid. & Cas. Co. of N.Y., 236 P. 210, 212 (Cal. Dist. Ct. App. 1925)).

25 Polen v. Baker, No. 99 CA 34, 2000 WL 776931, at *1 (Ohio Ct. App. May 31, 2000) (first and third alteration in original) (quoting the trial court opinion), *aff'd*, 752 N.E.2d 258 (Ohio 2001).

ence to the testator's intent.[26] Specifically, "a court is required to strictly construe [*in terrorem* clauses] and may not extend [them] beyond what was plainly the testator's intent."[27] This consideration will play a key role throughout this Note in resolving issues related to the breadth of *in terrorem* clauses today.

A related policy consideration often invoked by courts is the idea that *in terrorem* clauses serve the purpose of deterring litigation from ever taking place. The court exemplified this reasoning in *Tunstall v. Wells*.[28] There, the court was confronted with an *in terrorem* clause that sought to preclude distributions to all three of the testator's daughters in the event that any one of them contested the will.[29] Upholding the *in terrorem* clause, the court first focused on the testator's intent—particularly, that the testator's decision to impose the *in terrorem* clause as a gloss on the terms of the daughters' gifts was within his right as a testator.[30] It went on, however, to note that there is a strong public policy in favor of using *in terrorem* clauses to avoid litigation.[31] The court in *Russell v. Wachovia Bank* expounded on this sentiment, suggesting that such deterrence seeks not only to avoid the inevitable financial loss that accompanies litigation, but also to ensure a less contentious situation for the family.[32] These views of *in terrorem* clauses as deterrent mechanisms are important to the arguments this Note puts forth. If it is true that *in terrorem* clauses derive their effectiveness in part from their ability to prevent litigation ex ante, then they should be used more frequently to apply to as many claims as permissible under state law. By taking this approach, planners can potentially avoid unforeseen problems that often arise in today's litigious society, particularly with respect to inheritances.

The final consideration within the realm of the testator's interests is the policy consideration of practicality. As the copious amount of litigation over *in terrorem* clauses has shown, every estate plan does not go uncontested. One approach to avoiding this requires that the testator leave a potential contestant a substantial sum of assets in order to deter a contest.[33] Absent such a distribution, an *in terrorem* clause may "only create a false sense of security."[34] In certain situations, the testator is confronted with the difficult decision of

26 Grant v. Hixon (*In re* Estate of Strader), 132 Cal. Rptr. 2d 649 (Ct. App. 2003).

27 *Id.* at 653 (quoting Burch v. George, 866 P.2d 92, 96 (Cal. 1994) (in bank)).

28 50 Cal. Rptr. 3d 468 (Ct. App. 2006).

29 *Id.* at 469. This Note addresses clauses similar to this one that purport to cut out noncontesting beneficiaries as a result of a contest.

30 *Id.* at 474–75.

31 *Id.* at 475.

32 Russell v. Wachovia Bank, N.A., 633 S.E.2d 722, 725–26 (S.C. 2006).

33 Gus G. Tamborello, *In Terrorem Clauses: Are They Still Terrifying?*, 10 EST. PLAN. & COMMUNITY PROP. L.J. 63, 64 (2017) ("Under a standard scenario, the testator makes a bequest to the beneficiary (although not always) and then inserts a clause which forces the beneficiary to either accept the gift under the will or trust or to contest the instrument with the hope of setting aside the testator's intended disposition.").

34 Wendy S. Goffe, Planning for Nontraditional Families 89 (June 2011) (unpublished manuscript), http://ssrn.com/abstract=1867304.

either choosing to omit the person who the testator has identified as being potentially problematic at the time of the estate's administration, or else giving him substantial assets in hopes of deterring his contest.[35]

Like most areas of the law, trust and estate law is a law of people. This means that courts are often faced with having to balance competing interests. In addition to the abovementioned interests of the testator, courts must also balance interests of beneficiaries with respect to *in terrorem* clauses. Courts first look to the public policy consideration of preventing the probate of wills procured by wrongdoing. Were the court to permit the probate of a will procured only because of undue influence of the testator, it would in fact be ratifying a document that *does not* reflect the testator's intent. In holding that the broad *in terrorem* clause at issue was unenforceable concerning the plaintiff's claims, the court in *In re Estate of Singer* explained the fine line between giving effect to the testator's intent and ensuring that an improperly procured will was not admitted to probate.[36] Importantly, "[i]nterpreting the clauses too broadly would frustrate the public policy of ensuring that wills are genuine and valid before they are admitted to probate."[37] Thus, while the testator's intent must be given primary effect, it is important for planners to draft these clauses to comport with state law.

In conjunction with the law's effort to seek judicial affirmation that a will was not wrongly procured, courts also interpret *in terrorem* clauses in light of the law's aversion to forfeitures. With the threat of forfeiture looming in every will contest involving an *in terrorem* clause, the courts carefully consider this policy. As in previous court decisions, in *Rafalko v. Georgiadis* the court deferred to the policy consideration of avoiding forfeitures *along with* the consideration of the testator's intent.[38] The combination of these policy considerations thus requires that courts strictly construe *in terrorem* clauses.[39]

With the historical and policy foundations of *in terrorem* clauses established, this Note now proceeds to discuss how these considerations can influence a further evolution in the modern landscape of *in terrorem* clauses.

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35 *But see* Sarah C. Jenkins, *How Testators Can Leverage Indiana's Repeal of the Prohibition on No Contest Clauses*, RES GESTAE, May 2018, at 26, 28.

36 *In re* Estate of Singer, 920 N.E.2d 943, 947 (N.Y. 2009).

37 *Id.*

38 Rafalko v. Georgiadis, 777 S.E.2d 870, 875 (Va. 2015) ("When determining whether a beneficiary's actions have triggered a no contest clause, we strictly construe the language of the clause because the drafter chose the language and forfeiture is disfavored in the law.").

39 *See id.*; *see also* Pihlajamaa v. Kaihlan (*In re* Estate of Kaila), 114 Cal. Rptr. 2d 865, 870 (Ct. App. 2001) ("Although no contest clauses are valid and favored by the public policies of discouraging litigation and giving effect to the testator's intent, they are also disfavored by the policy against forfeitures and therefore are strictly construed and may not extend beyond what plainly was the testator's intent.").

II. BREADTH OF *IN TERROREM* CLAUSES TODAY

A. Breadth as to People Excluded Under In Terrorem *Clauses*

Despite the volume of caselaw providing an analysis of *in terrorem* clauses, a considerable amount of confusion has persisted around applying them correctly.[40] This is due in large part to the inconsistency with which courts balance the policy considerations discussed herein.[41] The result of this inconsistency is that courts often apply *in terrorem* clauses too broadly or too narrowly.[42] In reality, there are specific claims and specific people against which *in terrorem* clauses should be applied. While broad judicial application of *in terrorem* clauses ensures that the clauses are effective in avoiding costly litigation, there are other claims against which state courts will avoid application in order to avoid the probate of a wrongfully procured will.[43]

For today's practitioners and judiciary, there are two leading problems with respect to maximizing the effectiveness of *in terrorem* clauses. The first problem, defined in this Note as the "puppet problem," presents a common fact pattern that several courts have managed to navigate by giving deference to the policy considerations discussed above. The second problem confronted by practitioners is how to adequately deter certain classes of potential contestants from bringing suit against a client's estate plan *without* relying on making substantial distributions to such people in certain cases. In order to avoid these problems, *in terrorem* clauses should be drafted and upheld broadly in terms of *whom* they purport to exclude in the event of a failed contest.

1. The Puppet Problem

The puppet problem is best exemplified in the related Wyoming cases of *Willey v. Willey*[44] and *EGW v. First Federal Savings Bank of Sheridan*.[45] Both cases arose out of the same facts. Allen F. Willey created a revocable trust for the benefit of his son, Spencer, as well as Spencer's children at Allen's

40 *See* 3 JOHN A. BORRON, JR., SIMES & SMITH: THE LAW OF FUTURE INTERESTS § 1518, at 604 (3d ed. 2004) ("There is much the same confusion of legal doctrine and of conclusions found in the cases dealing with provisions which purport to forfeit the interest of a beneficiary of a will or other dispositive instrument if he contests the validity of the instrument as is found in the cases relating to restraints on marriage.").

41 *See id.*; *see also supra* Part I (discussing policy considerations of *in terrorem* clauses).

42 *See* BORRON, *supra* note 40, § 1518, at 604 ("[D]ecisions tend to assume that the no-contest provisions must be totally valid or totally void."). Such "all or nothing" application of *in terrorem* clauses is illustrative of courts' failure to consider adequately policy considerations such as the law's dislike of forfeitures and the testator's intent. As evidenced by the testator's use of the *in terrorem* clause at the outset, it is likely adverse to the testator's intent to completely invalidate the *in terrorem* clause as to all potential contests against the estate plan.

43 *Id.*

44 2016 WY 116, 385 P.3d 290.

45 2018 WY 25, 413 P.3d 106.

death.[46] He subsequently amended his revocable trust, removing Spencer as beneficiary and successor trustee and reducing the distribution Spencer's children were to receive.[47] Allen also included an *in terrorem* clause in anticipation of litigation as a result of the amendments.[48] Allen's fears of litigation were not fanciful. Soon after the amendment, Spencer filed a complaint alleging, among other things, that the trust amendments were the product of undue influence.[49] Subsequently, in *EGW*, Spencer's children asked the court to remove First Federal as successor trustee under the amended trust and determine that the *in terrorem* clause, which disallowed Spencer *and his children* from benefitting from the trust in the event of a failed contest, be deemed void as against public policy.[50] This fact pattern illustrates what the results of the puppet problem would be in the absence of judicial acceptance of a clause similar to Allen's. Similar to what occurred in *Willey*, Spencer's children, who retained their beneficial interest in the trust, would have been able to utilize their father's position to contest Allen's trust, seeking the reinstatement of their preferred trustee, with no risk of losing their interest.[51] They did this because they believed the *in terrorem* clause to be against public policy and thus void.[52] In speaking to this issue for the first time, the Wyo-

46 *Id.* ¶ 3, 413 P.3d at 107.

47 *Id.* ¶ 4, 413 P.3d at 107–08.

48 *See id.* ¶ 5, 413 P.3d at at 108. The language of Allen's *in terrorem* clause maximizes the effectiveness of the clause in modern trusts and estates law. It read as follows:

> It is my intention that the provisions of my Trust be honored and respected without challenge from my son SPENCER WILLEY, from my grandchildren, from my sisters or their children, or from anyone purportedly acting on behalf of any of the foregoing. Any challenge to this Trust made directly by or on behalf of my son or grandchildren shall immediately terminate any interest in the Trust of any descendant of mine[.]

Id. (alteration in original). Such broad language is not uncommon in modern estate planning. Benjamin M. Jakubowicz & John R. Cummins, *Court Finds No Violation of Public Policy Where Challenge to Trust Causes Minors to Forfeit Inheritance*, BINGHAM GREENEBAUM DOLL LLP (Nov. 12, 2018), https://www.dentons.com/en/insights/articles/2018/november/12/court-finds-no-violation-of-public-policy-where-challenge-to-trust-causes-minors-to-forfeit. The question remains, however, whether courts will always enforce such broad language. An analysis of the caselaw on these clauses shows that their enforceability depends in part on whether they are limited to a contestant's descendants or to *all* beneficiaries. *See infra* text accompanying note 72.

49 *Willey*, 2016 WY 116, ¶ 1, 385 P.3d at 293.

50 *EGW*, 2018 WY 25, ¶ 9, 413 P.3d at 108.

51 It might be argued that the use of broad language in Allen's trust to apply to contestants and their descendants did not solve the puppet problem in this instance since Spencer's children still brought suit. This argument is without merit since the legitimacy of such a clause at the time of the proceeding was completely unclear. The Wyoming Supreme Court concedes this in its opinion, suggesting that the validity of this provision was a "matter of first impression for the Court." *Id.* ¶ 20, 413 P.3d at 111. This Note proceeds on the notion that once courts begin to consistently enforce *in terrorem* provisions against both the contestant and his or her descendants, claims similar to those brought by Spencer's children in *EGW* and Spencer individually in *Willey* will begin to dissipate.

52 *Id.* ¶ 9, 413 P.3d at 108.

ming Supreme Court upheld the validity of Allen's *in terrorem* provision on public policy grounds.[53] Writing for the court, Chief Justice Burke focused on the primacy of the testator's intent as the primary grounds for upholding the *in terrorem* clause. He reasoned that inherent in the idea that the testator's intent should be a major consideration of public policy is the idea that courts are often ill equipped to analyze complex family dynamics.[54] Indeed, a testator who knows that a contestant is likely to be beholden to the contestant's children will largely benefit from a clause like the one contained in Allen's trust. In *Tunstall v. Wells*, a California court of appeals upheld a similar clause on the same rationale.[55] Noting the fairness of upholding the validity of such a broad clause, the court reasoned that the testator's intent was clear: he wanted to treat his daughters as a group.[56] Similar to the reasoning in *EGW*, the court also cautioned against excessive judicial interference with the clearly expressed intent of the testator, since the testator knows more about the "internal dynamics and interrelationships within a family" than does the court.[57] Consistent with the primacy of the testator's intent and ensuring maximum practicality of *in terrorem* clauses, the court also reiterated the trial court's concern with collusion.[58] While the court did not explicitly identify this as a "puppet problem," its reasoning explains how such a problem is solved through the clause at issue. It noted that a clause that is broad in terms of whom it purports to exclude "discourages collusion between [potential contestants] to have one contest the Trust without placing the others' gifts at risk."[59] As shown in *EGW* and *Tunstall*, *in terrorem* clauses that seek to apply broadly in terms of who they exclude effectuate the testator's intent by eliminating the puppet problem, thus maximizing the effect of *in terrorem* clauses in modern trusts and estates law.[60]

53 *Id.* ¶ 21, 413 P.3d at 112–13.

54 *Id.*

55 Tunstall v. Wells, 50 Cal. Rptr. 3d 468, 469 (Ct. App. 2006). This case involved an *in terrorem* clause that sought to revoke a gift to all of the testator's daughters if any one of them contested the will. *Id.* While this clause is beyond the boundaries this Note argues should be observed, the court's reasoning is still instructive.

56 *Id.* at 476. The court deduces this conclusion from the fact that each daughter was awarded an identical bequest. *Id.*

57 *Id.* at 475.

58 *Id.* at 476.

59 *Id.* The court goes on to suggest that "even if the clause opens the possibility of improper collusion between . . . [the] sister[s], it does not mandate or actively encourage such impropriety." *Id.*

60 It is difficult to fully illustrate the breadth of the puppet problem through a caselaw analysis, since most contests in the realm of estate planning are resolved through private settlement. *See* Nancy Mann Jackson, *Where There's a Will . . .*, AARP (Aug. 17, 2011), https://www.aarp.org/money/estate-planning/info-08-2011/contesting-wills.html (quoting a New York elder law attorney who settled every will contest in her career out of court).

2. The New Carrot and Stick

A second problem often faced by modern planners is how to ensure that potential contestants have an incentive *not* to contest the client's estate plan. The obvious solution would be to give a potential contestant an incentive not to contest by ensuring that the client's plan allows for them to receive a substantial distribution. In situations where an *in terrorem* clause applies to all named beneficiaries, there is no difficulty in providing such an incentive. This approach might be problematic, however, where the testator's will would otherwise exclude a beneficiary, as the testator would be placed in the position of having to give a substantial amount of assets to someone he would otherwise omit from his plan, or else to omit the person, thus immunizing such person from the threat of the *in terrorem* clause. In these cases, such a situation fails to give effect to the testator's true intent, and the law should thus find a more efficient resolution.[61] A better solution to this problem would be for planners to depend on an *in terrorem* clause that provides an alternative incentive to the potential contestant to avoid a contest: broad application of the *in terrorem* clause to the contestant's descendants. This problem was presented to the Supreme Court of Pennsylvania in *In re Houston's Estate*.[62] The testator in that case provided that if his wife elected against the will, his two sons would receive nothing.[63] When the widow elected against the will, the two sons filed exceptions, claiming that the provision was against public policy.[64] The court went on to discuss that the widow was "faced with the unfortunate choice of receiving a small legacy or causing the children to lose their bequests."[65] Similar to the reasoning in *EGW* and *Tunstall*, the court in *In re Houston's Estate* upheld the provision on the basis that the decision to place the widow in such a situation was a question of the "wisdom of the testator."[66] While the widow in that case was undeterred by the prospect of her sons losing their inheritance, the language invoked in the instrument at issue is helpful in clarifying the instances in which the *in terrorem* clauses advocated by this Note are most effective. First, in certain circumstances, clients should be enabled to make smaller distributions to potential contestants, similar to the distribution in *In re Houston's Estate*. Indeed, the necessity of providing substantial assets to a potential contestant is not as great when there is an additional threat that both the contestant and his or her descendants might suffer forfeiture. Thus, a smaller distribution of assets will be sufficient to deter many contests from the outset when used in conjunction with such a clause. Furthermore, this Note's contention is that *in terrorem* clauses should only apply to a contestant and the contestant's

61 In these cases, the testator's true intent is often to preclude a person they have identified as a potential contestant from receiving an inheritance in the event of a failed contest, while at the same time protecting their estate plan from contest at all.

62 89 A.2d 525, 526 (Pa. 1952).

63 *Id.*

64 *Id.*

65 *Id.*

66 *Id.*

descendants. This is because in most family settings, a person will be more hesitant to deprive his descendants of their inheritance through a failed contest than someone to whom they are not related. It follows that since the contestant is in charge of otherwise financially providing for his descendants, he would stand to benefit from a distribution to his descendants. Based on this reasoning, it is highly likely that the widow in *In re Houston's Estate* chose to elect against her husband's estate with the intent of using the proceeds to support her children. In contrast, a properly applied *in terrorem* clause would seek to disallow the *widow and her descendants* from benefitting from a contest at all.[67]

3. Arguments Against These Clauses: Fairness to Beneficiaries

While the discussion of *in terrorem* clauses above may seem ideal for planners looking to ensure that the testator's intent is preserved, these clauses undoubtedly raise questions of fairness with respect to beneficiaries. The plaintiff in *Succession of Kern* raised similar arguments.[68] The *in terrorem* clause at issue in that case rendered the will's distribution scheme null and void for all beneficiaries in the event of a "challenge[ ] or protest[ ], in any way by any heir."[69] The court held that this clause was invalid, as it rendered the beneficiaries "virtually helpless and at the mercy of *any* heir not mentioned in the will."[70] The court went on, however, to distinguish an *in terrorem* clause whose application was limited to legatees receiving a benefit from the will.[71] Legal scholars have also weighed in on similar clauses, arguing that provisions that seek to omit *all* beneficiaries from receiving their distributions under a will as a result of the failed contest of only *one* contestant "encourage collusion between the party excluded and the party that would benefit by the forfeiture."[72] These arguments provide a practical boundary to this Note's argument. By limiting the breadth of *in terrorem* clauses to application only to a contestant and the contestant's descendants,

67 Spouses will often have remedies that likely circumvent the protection provided by *in terrorem* clauses, namely, the elective share. *See* 1 FREDERICK K. HOOPS ET AL., FAMILY ESTATE PLANNING GUIDE § 17:23 (4th ed.), Westlaw (database updated Oct. 2019) ("An *in terrorem* clause is . . . ineffective to preclude a spouse's assertion of his or her elective share . . . ."). While elective-share laws in many states will not usually permit a distribution as sizable as a contest of the plan would, their intricacies are outside the scope of this Note. *See In re* Estate of Myers, 825 N.W.2d 1, 6 (Iowa 2012) ("It is clear that the legislature . . . intended to limit the property that would be included in the surviving spouse's elective share to the four categories of property specifically identified in the statute.").

68 Succession of Kern, 252 So. 2d 507, 509 (La. Ct. App. 1971).

69 *Id.* at 510.

70 *Id.* (emphasis added).

71 *Id.* ("The provision in the will before us is particularly vicious since there is a third party, not an heir, designated to reap the benefits of a protest or challenge 'by any heir.'").

72 *Recent Cases*, 97 U. PA. L. REV. 559, 574–76 (1949) (discussing Alper v. Alper, 60 A.2d 880 (N.J. Ch. 1948)). *Alper* involved an *in terrorem* clause that forfeited the shares of all beneficiaries under the will in the event of a contest by any of the testator's children or named grandchildren. *Alper*, 60 A.2d 880.

such clauses will fall within the *Succession of Kern* court's zone of permissibility. Moreover, the issues of collusion put forward by legal scholars are in fact *solved* by *in terrorem* clauses that seek to preclude a contestant and the contestant's descendants from receiving their interests under a will. It may well be that a contestant would be undeterred by the prospect of causing a distant relative or a perfect stranger to lose his inheritance. To be sure, this overly broad application of an *in terrorem* clause was at issue in *Alper*, the case that legal scholars cite in favor of avoiding collusion. This is less of an issue in the context of the *in terrorem* clauses proposed in this Note because they would only seek to preclude a contestant and the contestant's descendants from receiving a distribution. A contestant will usually be more likely to consider the potential disinheritance of his descendants than someone to whom he is not related. The *in terrorem* clauses advocated for in this Note further resolve the problems of collusion by minimizing the puppet problem The puppet problem is most prevalent when the testator amends his initial estate plan, excluding his child and providing for a smaller distribution to his grandchildren (the descendants of said child) than they would have received under the initial plan. The problem under these circumstances is that the party excluded (often the child of the testator) and the party who still has something to lose under the amended plan (the grandchildren of the testator) may collude to use the testator's child as a puppet to have their interest in the initial plan reinstated.[73] As illustrated, this problem is solved in most instances by threatening the testator's child with the risk of disinheriting his own children as well.[74]

In conclusion, by drafting and enforcing *in terrorem* clauses that apply broadly to a contestant and a contestant's descendants, practitioners and lawmakers can maximize the effectiveness of *in terrorem* clauses by minimizing two major problems in trust and estate law today.[75]

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73 It is true that under a theory of *intestacy* the child of the testator would take in preference to the grandchildren of the testator. As illustrated in *EGW* and *Tunstall*, however, the puppet problem often appears in the context of a will codicil or amended trust. Thus, the "puppet" in these cases will most likely seek reinstatement of the original instrument, *not* a dissolution of the entire plan resulting in intestacy.

74 Unlike most areas of the law, will and trust contests are often motivated not by money but by emotion. *See* Jeffrey A. Schoenblum, *Will Contests—An Empirical Study*, 22 REAL PROP. PROB. & TR. J. 607, 618 (1987) ("[Contestants'] prime motivation may not be financial at all; instead, they may be motivated by a deeper psychological or emotional need . . . ."). Assuming that contestants often prioritize their emotions over money supports the idea that an emotional connection to someone's descendants, unlike in *Alper* where the children were not related to the widow, may cause a potential contestant to abstain from bringing suit where the threat of loss of money might not.

75 As the prevalence of *in terrorem* clauses with language similar to that which this Note suggests increases, it will become even more important for counsel representing a beneficiary or other potential contestant of an estate plan to pay close attention to what the *in terrorem* clause purports to do. *See* Jakubowicz & Cummins, *supra* note 48 ("Any beneficiary contemplating a contest to . . . a testamentary instrument containing an *in terrorem* clause should review closely its operative terms before moving forward with such a contest or challenge.").

B. Breadth as to Claims Excluded Under In Terrorem *Clauses*

As trusts and estates law moves to expand *in terrorem* clauses to apply to a contestant and the contestant's descendants, the stakes of any contest undoubtedly will increase. *In terrorem* clauses will therefore need to be drafted so as to ensure they apply to the claims permitted by the laws of the planner's state.

1. State Jurisprudence

Some states apply *in terrorem* clauses to a broad variety of claims. Courts in Washington, D.C.,[76] and Ohio[77] have explicitly rejected exceptions for claims brought in good faith or with probable cause. In addition, New Hampshire adopted a similar law by statute.[78] In states like Kentucky, "[t]he validity of a clause providing that a legatee shall forfeit his interest if he contests a will[ ] has been upheld in several decisions."[79] While such decisions "seem inconclusive" as to whether *in terrorem* clauses apply to claims brought in good faith or with probable cause,[80] it is at least possible that Kentucky would allow for a similar approach.[81] The expansive nature of the law in these states gives practitioners more flexibility in drafting, thus allowing them to draft *in terrorem* clauses that apply to a broader variety of claims.

In contrast to these broad applications, other states take a more confined approach by adopting various exceptions to the application of *in terrorem* clauses. The first variety of exceptions is exemplified in the Uniform Probate Code (UPC). The UPC's approach sets forth the scheme adopted by many states with respect to which claims an *in terrorem* clause should apply.[82] UPC section 3-905 provides that "[a] provision in a will purporting to penalize any interested person for contesting the will or instituting other proceed-

76 Ackerman v. Genevieve Ackerman Family Tr., 908 A.2d 1200, 1203 (D.C. 2006) ("[T]here is no exception to enforcement of a 'no contest' clause even when litigation is brought in good faith and with probable cause . . . .").

77 Modie v. Andrews, No. C.A. 21029, 2002 WL 31386482, at *3 (Ohio Ct. App. Oct. 23, 2002) ("[T]o recognize [an exception for probable cause or good faith] would in fact destroy the rule itself . . . ." (quoting Bender v. Bateman, 168 N.E. 574, 575 (Ohio Ct. App. 1929))).

78 N.H. REV. STAT. ANN. § 551:22(II) (West 2019) ("A no-contest provision shall be enforceable according to the express terms of the no-contest provision without regard to the presence or absence of probable cause for, or the beneficiary's good or bad faith in, taking the action that would justify the complete or partial forfeiture of the beneficiary's interest in the will under the terms of the no-contest provision.").

79 2 NORVIE L. LAY & JAMES R. MERRITT, KENTUCKY PRACTICE: PROBATE PRACTICE AND PROCEDURE § 1179 (2d ed.), Westlaw (database updated Nov. 2019) (citing Moorman v. Louisville Tr. Co., 203 S.W. 856 (Ky. 1918)).

80 *Id.*

81 *See* T. Jack Challis & Howard M. Zaritsky, *State Laws: No-Contest Clauses*, AM. C. TR. & EST. COUNS. 2 (Mar. 24, 2012) (listing Kentucky as a state that "enforce[s] no-contest clauses without regard to probable cause or good faith") https://www.actec.org/assets/1/6/State_Laws_No_Contest_Clauses_-_Chart.pdf.

82 UNIF. PROB. CODE § 3-905 (UNIF. LAW COMM'N, amended 2019).

ings relating to the estate is unenforceable if probable cause exists for instituting proceedings."[83] Such language has gained prominence within a number of states.[84] Thus by avoiding the application of an *in terrorem* clause to *any* claim, and opting instead to apply them only to claims not made in good faith, practitioners can ensure compliance with the relevant state laws. Lawmakers in these states reason that this application of *in terrorem* clauses fits better with the policy considerations of the primacy of the settlor's intention and the interpretative purpose of the judiciary. In *South Norwalk Trust Co. v. St. John*,[85] the Supreme Court of Errors of Connecticut considered the merits of avoiding application of an *in terrorem* clause to a claim made in good faith.[86] The court reasoned that by bringing a claim in good faith, the contestant is assisting the court in its role as the judge of the testator's intent.[87] Also considering the role of the court in will contests, the Supreme Court of New Jersey viewed the legislature's adoption of the "good faith" exception to *in terrorem* clauses as "strongly influential in the judicial quest for the important societal values which are constituent elements of the common law," even though the statute did not apply to the case before the court.[88] Still, some lawmakers are hesitant to adopt this reasoning. In his dissent in *Haynes v. First National State Bank of New Jersey*, Justice Clifford argued that he would have permitted the *in terrorem* clause at issue because a testator ought to be able to manifest his intentions "without fear that a court will disregard [them]."[89] For lawmakers in these states, the difficulty with this line of reasoning is that it fails to consider *when* a court may intervene to ensure that the testator's intentions are truly being effectuated.[90] By adopting such a

83 *Id.*

84 *See* ALASKA STAT. ANN. § 13.16.555 (West 2019); ARIZ. REV. STAT. ANN. § 14-2517 (2019); COLO. REV. STAT. ANN. § 15-12-905 (West 2019); HAW. REV. STAT. ANN. § 560:3-905 (West 2019); IDAHO CODE ANN. § 15-3-905 (West 2019); MD. CODE ANN., EST. & TRUSTS § 4-413 (West 2019); MICH. COMP. LAWS ANN. § 700.3905 (West 2019); MINN. STAT. ANN. § 524.2-517 (West 2019); MONT. CODE ANN. § 72-2-537 (West 2019); NEB. REV. STAT. ANN. § 30-24,103 (West 2019); N.J. STAT. ANN. § 3B:3-47 (West 2019); N.M. STAT. ANN. § 45-2-517 (West 2019); N.D. CENT. CODE ANN. § 30.1-20-05 (West 2019); S.C. CODE ANN. § 62-3-905 (2019); S.D. CODIFIED LAWS § 29A-3-905 (2019); UTAH CODE ANN. § 75-3-905 (West 2019); Parker v. Benoist, 160 So. 3d 198, 206 (Miss. 2015).

85 101 A. 961 (Conn. 1917).

86 *Id.* at 961–63.

87 *Id.* at 963; *see also* Tate v. Camp, 245 S.W. 839, 844 (Tenn. 1922) ("There will be no more burden put upon the court in finding the fact of probable cause than in finding similar facts in other classes of cases.").

88 Haynes v. First Nat'l State Bank of N.J., 432 A.2d 890, 903–04 (N.J. 1981); *see also* Carr v. Carr, 576 A.2d 872, 879 (N.J. 1990) ("[C]ourts should seek to effectuate sound public policy and mold the law to embody the societal values that are exemplified by such public policy.").

89 *Haynes*, 432 A.2d at 904–05 (Clifford, J., dissenting in part).

90 Justice Clifford subscribed to this reasoning, stating:

> We may see [*in terrorem*] clauses as representing the most disagreeable impulses of a testator. They may lay bare one's mean, uncharitable, impervious, suspicious, hostile, downright churlish nature and then some. I do *not* suggest that Mrs.

view, courts fail to give effect to the policy consideration against the administration of an instrument that has been wrongfully procured.[91] As a result, the best way to ensure that what *appears* to be the testator's intent *is in fact* such intent is to ensure that courts have a way to analyze the instrument at issue, in lieu of "rubber stamping" every estate plan placed before them. To be sure, this Note does argue that the testator's intent should be the primary consideration of courts presented with an *in terrorem* clause. However, the reasons for the primacy listed above, including the fact that the testator has the best knowledge of his or her family dynamics,[92] lead courts in these jurisdictions to the conclusion that as to claims brought in good faith, they have discretion to determine whether the testator's intent has been given effect.[93]

Another category of exceptions to *in terrorem* clauses is even more specific than the standard articulated by the Uniform Probate Code. Evidently seeking to eliminate unnecessary litigation from their courts, states like Delaware, Texas, and California have specifically enumerated the claims to which *in terrorem* clauses will not apply. Delaware law provides that *in terrorem* clauses do not apply to a variety of actions, including actions brought by trustees, actions to determine whether a contest will be included within the meaning of an *in terrorem* clause, and actions seeking judicial construction.[94] On a similar note, Texas law does not apply *in terrorem* clauses to construction proceedings but goes further in refusing to apply them in proceedings against a fiduciary.[95] California's law is even more restrictive, applying *in terrorem* clauses *only* to a contest brought without probable cause, a challenge to the transfer of property based on a dispute of ownership of that property, and the filing of a creditor's claim.[96] Similar to the laws that do not apply *in terrorem* clauses to claims brought in good faith, these laws also illustrate the necessity of specificity in drafting in many circumstances.

Several states take a different approach, refusing to apply an *in terrorem* clause to claims brought by certain categories of plaintiffs. In *In re Shuster*, a guardian ad litem appeared on behalf of a person deemed "under disability"

> Dutrow manifested any of those characteristics, but I *do* suggest that testators are allowed to exhibit all of them, and worse, without fear that a court will disregard their final wishes.

Id. at 905. The issue for lawmakers in these states is that this argument assumes that manifestations within a will are in fact the final wishes of the testator and not those of an influential and opportunistic relative, which is not always the case.

91 *See* BORRON, *supra* note 40, § 1518.

92 *See supra* text accompanying note 57.

93 As an example, if a will was procured through undue influence, the document itself may appear to reflect the testator's intent. Only through judicial interference allowing for discovery would a wronged beneficiary be able to prove what the testator's intent truly was. By blindly enforcing *in terrorem* clauses, courts would preclude the beneficiary from being able to do so.

94 DEL. CODE ANN. tit. 12, § 3329 (West 2019).

95 TEX. EST. CODE ANN. § 254.005 (West 2019).

96 CAL. PROB. CODE § 21311(a) (West 2019).

to contest the decedent's will.[97] The will at issue in that case had an *in terrorem* clause that applied to "any 'attempt to contest or oppose the probate or validity of [the] [w]ill, or any [c]odicil thereto.'"[98] Despite the broadly drafted language of this clause, the court permitted the plaintiff to proceed without applying the *in terrorem* clause.[99] Similarly, in *Bryant v. Tracy*, the minor-daughter from the decedent's first marriage sought to contest the decedent's will, which provided that the decedent's second wife was to receive the bulk of his estate.[100] In permitting the minor-daughter to proceed with the contest by way of a guardian ad litem, the court reasoned that a forfeiture should not apply in the event of the contest's failure.[101] Support for these decisions is reflected in at least one trusts and estates practice commentary.[102] In short, this policy is viewed as reflective of the rights of infants and the disabled.[103] Furthermore, those using a guardian ad litem "ma[ke] no contest, nor authorize[ ] or direct[ ] any as a matter of fact."[104] The contest is that of another acting under no authority delegated by the infant or person under disability, but under the authority and direction of the law.[105]

The most expansive category of *in terrorem* exceptions exists only in Florida, which does not permit the use of *in terrorem* clauses at all.[106] Until recently, Indiana maintained a similar system, providing that "any clause 'that provides, or has the effect of providing, that a beneficiary forfeits a benefit from the trust [or will] if the beneficiary contests the trust [or will] is void.'"[107] In July 2018, the Indiana General Assembly changed course, amending the state code to permit the use of an *in terrorem* clause under certain circumstances.[108]

2. Solution to Risks of Increased Litigation: What Planners Can Do

In lieu of overly broad or overly narrow drafting techniques, practitioners should adopt a method of drafting that best comports with the respective

97 *In re* Shuster, 710 N.Y.S.2d 383, 384–85 (App. Div. 2000).

98 *Id.* at 384.

99 *Id.* at 385.

100 Bryant v. Tracy, 27 Abb. N. Cas. 183, 185–86 (N.Y. Sup. Ct. 1891).

101 *Id.* at 185, 192.

102 *See* N.Y. EST. POWERS & TR. LAW § 3-3.5 practice cmt. (McKinney 2019).

103 *See id. But see In re* Estate of Cagney, 720 N.Y.S.2d 759 (Sur. Ct. 2001), *aff'd*, 293 A.D.2d 675 (N.Y. App. Div. 2002) (applying an *in terrorem* clause against a minor whose guardian ad litem bargained away his rights to contest his grandparents' will).

104 *Bryant*, 27 Abb. N. Cas. at 192.

105 *Id.*

106 *See* FLA. STAT. ANN. § 732.517 (West 2019) ("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."). This Note does not argue in favor of laws as expansive as Florida's. Rather, it focuses on ways to tailor *in terrorem* clauses to a client's situation to maximize the effectiveness of the clause.

107 *See* Jenkins, *supra* note 35, at 26 (alterations in original) (quoting IND. CODE § 30-4-2.1-3 (2003) (amended 2018)).

108 *See* IND. CODE § 29-1-6-2 (West 2020).

state laws above. This method requires practitioners to understand the types of claims that their respective states are adopting and to draft *in terrorem* clauses accordingly. One way planners can maximize the effectiveness of an *in terrorem* clause would be to establish a trust in any of the jurisdictions upholding *in terrorem* clauses against a broad number of claims, either through the use of a trustee situated in that state or by other means.

By drafting *in terrorem* clauses in accordance with the laws of the states referenced above, practitioners also give the testator and any potential contestants a better idea of the security mechanism protecting the plan. Furthermore, as the law around *in terrorem* clauses moves to preclude a contestant and his or her descendants from recovering in the event of a failed contest, the stakes for *in terrorem* clauses to comport with state law will be even higher than before.

C. Breadth as to Where In Terrorem *Clauses Are Used*

As lawmakers and practitioners begin to work together to effect the changes above to make *in terrorem* clauses more effective, the demand for them will be higher and stretch into other nonprobate areas. Questions surrounding such extension have recently been proffered by trusts and estates lawyers, but there has yet to be any authoritative ruling in favor of or against the practice.[109]

1. Judicial Embrace of Expansion of *In Terrorem* Clauses to Nonprobate Instruments

Despite this absence of authority, there are meritorious policy and practical arguments for the use of *in terrorem* clauses in this way, particularly as planners aim to avoid probate for both high- and low-wealth clients.[110] The use of *in terrorem* clauses in nonprobate assets is not completely unsettled. In *Keener v. Keener*, the Supreme Court of Virginia addressed a question of first impression: whether a no-contest clause in a will legally operates the same as in a trust.[111] In holding that there was no difference in application between the two instruments, the court reasoned that "[b]ecause the testator relied on the trust for the disposition of his property, . . . it [was] appropriate to give full effect to [the] no-contest provisions in such trusts for the same reasons that support the enforcement of such provisions when they appear in

109 *See* Morris A. Baldinger, Posting to *Thread: IRA Beneficiary Form-No Contest Clause*, INTERACTIVE LEGAL (Aug. 21, 2019, 4:59 PM) (on file with author) ("Is it possible to subject a beneficiary designation to an in terrorem clause?").

110 *See* Russell N. James III, *The New Statistics of Estate Planning: Lifetime and Post-Mortem Wills, Trusts, and Charitable Planning*, 8 EST. PLAN. & COMMUNITY PROP. L.J. 1, 26 (2015) ("[T]he 55+ population is shifting away from probate planning, with wealthier people shifting toward funded trust planning and the less wealthy shifting toward non-probate transfer titling. Although no data for the use of non-probate transfer titling is available in this dataset, it is reasonable to speculate that the less wealthy may be more likely to use such relatively simple and easy devices as a means to avoid probate." (footnote omitted)).

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

wills."[112] As reflected by this ruling, courts are not hesitant to apply the same principles of *in terrorem* clauses in wills to trusts, which are nonprobate instruments. On this reasoning, there is little impediment to extending *in terrorem* clauses to other nonprobate instruments like life insurance or IRA beneficiary designation forms.

2. Practitioner Embrace of Expansion of *In Terrorem* Clauses to Nonprobate Instruments

In addition to judicial support for the use of *in terrorem* clauses to apply to nonprobate assets, practitioners are beginning to draft *in terrorem* clauses in contemplation of their expanding use. In *In re Marriage of Lund*, a California court of appeals was presented with a will that provided the following language in the section of the instrument related to its *in terrorem* clause:

> For these purposes, my Estate Plan or Dispositive Plan includes but are not limited to this my Last Will and Testament, including all Codicils, my and my spouse's Trust, Agreement, any amendment, any amendment and restatement thereto, any lifetime gifts or transmutations, and *any designation of beneficiary executed by me with respect to any and all life insurance policies, employee benefit plans, IRA's or other contractual arrangements.*[113]

Practically, this language reflects a potential way in which testators could draft their *in terrorem* clauses to apply to their nonprobate assets. The next step, however, is determining the best mechanism for enforcement of this clause in the event of a contest.

3. Enforcement of Expanded *In Terrorem* Clauses in Nonprobate Instruments

The most practical way in which *in terrorem* clauses pertaining to nonprobate assets could be enforced in the event of an unsuccessful contest is by state courts.

While the enforcement of *in terrorem* clauses in IRAs and life insurance policies by financial intermediaries appears theoretically possible, it is well known that corporate entities are often change averse.[114] Accordingly, the enforcement of *in terrorem* clauses in nonprobate instruments will likely be

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112 *Id.* at 548.

113 *In re* Marriage of Lund, 94 Cal. Rptr. 3d 84, 91 (Ct. App. 2009) (emphasis added). The issue before the court concerned a marriage dissolution proceeding. *Id.* at 88. Consequently, the court failed to consider whether the language in the *in terrorem* clause was valid. This case is referenced only as an example that practitioners are wary of the expanding nature of *in terrorem* clauses.

114 *See* Michael J. Thacker, *Take a Walk in Our Shoes: How Ohio Trustees Can Cope with the Proposed Uniform Principal and Income Act*, 12 OHIO PROB. L.J. 9 (2001) ("Corporate trustees have been somewhat hesitant to embrace [a new Ohio law] . . . because they are concerned about liability . . . .").

the province of the judicial system.[115] Matters related to forfeitures of beneficiaries with respect to these types of assets are not new to most courts. In *SunTrust Bank v. Harper*, a Georgia court of appeals was presented with a challenge to a change of beneficiary of an IRA.[116] The court ultimately determined that the policyholder did not have the capacity to effectuate the change of beneficiary form.[117] As a result, the beneficiary under the most recent beneficiary designation form suffered a forfeiture, as the proceeds went to the original beneficiary of the policy.[118] Where the court's decision in that case resulted in the beneficiary's forfeiture because the plan was determined to be invalid, it is equally plausible that a court could have given effect to a theoretical *in terrorem* clause for the policy if the challenging beneficiary's claim had not been successful. Some courts have gone even further than using the threat of forfeiture to deter contests. In *Harrison v. Provident Relief Association*, a Virginia court of appeals upheld the validity of a clause in an insurance policy that *prevents* any contest of the policy.[119] The court reasoned that provisions "abounding in forfeitures . . . should be strictly construed against the insurer, and liberally in favor of the insured."[120] Such reasoning sounds synonymously in the policy consideration that courts prioritize most in upholding *in terrorem* clauses in wills and trusts: construing instruments in favor of the testator's intent.[121] The prospect of using *in terrorem* clauses in lieu of these "incontestable clauses" would be more effective in giving effect to the intent of the decedent, because they do not foreclose the idea of permitting judicial interpretation in the event of a potentially problematic instrument.[122]

The ideal solution to the expanding use of *in terrorem* clauses as a result of their increased effectiveness is to enable testators to draft *in terrorem* clauses to apply to nonprobate assets like life insurance policies and IRAs. In doing so, they will be able to depend on the courts to ensure the enforcement of these clauses as they would in the context of a will or trust.

CONCLUSION

Few areas of the law are as versatile as the law of trusts and estates. In a practice that seeks to effectuate the testator's intent above all, trusts and

115 This is the same as the enforcement of *in terrorem* clauses in wills and trusts, which depends on judicial interpretation to give effect to forfeitures in the event of an unsuccessful contest.

116 SunTrust Bank v. Harper, 551 S.E.2d 419, 423 (Ga. Ct. App. 2001).

117 *Id.* at 426.

118 *Id.* at 425.

119 Harrison v. Provident Relief Ass'n, 126 S.E. 696, 700 (Va. Ct. App. 1925). Such a clause should be contrasted with an *in terrorem* clause, which *permits* a contest but triggers a forfeiture in the event that the contest is unsuccessful.

120 *Id.* (quoting Stratton's Adm'r v. N.Y. Life Ins. Co., 78 S.E. 636, 640 (Va. 1913)).

121 *See supra* text accompanying note 25.

122 This Note argues that judicial interpretation can be used to *bolster* the intent of the testator. *See supra* note 93 and accompanying text.

estates lawyers must find ways to adapt to what their clients want. No estate plan can therefore guarantee a successful defense against all claimants or claims. This is particularly true in light of the increasingly unique family dynamics of the twenty-first century.

The law of trusts and estates can however seek out certain practices that ensure that most testators will be adequately protected after their deaths. For years, *in terrorem* clauses have been the primary mechanism whereby testators protected themselves from problematic family members or disgruntled beneficiaries. To date, these clauses have yet to achieve their full potential. Problems with coercive relatives and forced financial incentives have limited their effectiveness in traditional estate-planning mechanisms and other, more modern instruments. By addressing these problems through principles derived from history and public policy, practitioners and courts can properly tailor *in terrorem* clauses to the appropriate claims. In doing so, they enable the expansion of *in terrorem* clauses to a variety of nonprobate assets. Practitioners have developed effective provisions to eliminate the puppet problem in more recent times. And as the wealth of the baby boomer generation is transmitted to the next generation, we can expect to see more widespread use of *in terrorem* clauses, in large part to discourage all of the beneficiaries from contesting the will or trust and to thereby avoid the rising tide of family litigation sweeping the country.

This Note has thus suggested ways to address the problems that exist with *in terrorem* clauses, thereby making them more effective. Specifically, planners can address problems with the kind of *people* to which *in terrorem* clauses apply by applying them to a contestant and the contestant's descendants. Once such a scheme is in effect, the increase in those potentially suffering forfeiture will make it even more important for practitioners to draft *in terrorem* clauses to comply with the laws of the state in which they practice. Finally, with the increase in effectiveness in in terrorem clauses which will arise from their application to a contestant and the contestant's descendants and their compliance with state law, their utility will most effectively spread into other nonprobate assets, namely, IRAs and life insurance policies.

There is no doubt that the quest to find the proper turnip to make beneficiaries think twice before contesting an estate plan has not been without its problems, but the adoption of the aforementioned changes will make such efforts substantially less turbulent going forward.