The consequences for the plaintiff-beneficiary in the Tamposi Case were devastating: By bringing the action she forfeited all of her right, title and interest in the substantial trusts that were the subject of the litigation. She was ordered to reimburse the trusts for any distributions received by her, retroactive to the date of filing of the original Complaint. Her request for attorneys' fees and costs were denied. The lesson: As an in terrorem clause is a trap that could well spring merely upon the filing of a complaint, it is imperative that plaintiff's trial counsel carefully read and digest the entire governing trust instrument before filing anything in the courts. Trustee Shelton appealed the trial court's decision to enforce the in terrorem clause. On January 11, 2013, the Supreme Court of New Hampshire issued its opinion. "We conclude that, in this case, Shelton does not have standing to challenge the ruling that the in terrorem clause was violated...Indeed, it may be argued that by pursuing this appeal, Shelton's interests are adverse to all beneficiaries other than ... [the plaintiff-beneficiary]." See Shelton v. Tamposi, 2013 WL 132721 (N.H.) or http://www.courts.state.nh.us/supreme/opinions/2013/2013001shelton.pdf.

Loring and Rounds: A Trustee's Handbook (2013) contains a general discussion of the no-contest or in terrorem clause. That discussion is reproduced in its entirety below:

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No-contest or *in terrorem* provisions. A "no-contest" or "*in terrorem*" clause in a trust instrument provides for the forfeiture or reduction of the interest of a beneficiary who "contests" the arrangement.[90] The hope is that the beneficiaries will be deterred from engaging in costly litigation against the trustee, and one another, and in generally subjecting the settlor's personal affairs to unwanted publicity. Some courts have enforced such clauses.[91] Others have not.[92] In England, a no-contest clause is probably enforceable, provided it is coupled with an express gift over.[93] Overreaching is always a concern. The *in terrorem* clause contained in the 1046 will of the widow Wolgith for the benefit of King Edward the Confessor and others, for example, is the type of clause that one who is concerned about enforceability should probably avoid:

> "[A]nd, he who would ignore my will, which I have executed with the witness of God, may he be denied this earth's joy and may the Almighty Lord who created and shaped all beings shut him out of the gathering of

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

[91] *See generally* Annot., *Validity and enforceability of provisions of will or trust instrument for forfeiture or reduction of share of contesting beneficiary*, 23 A.L.R.4th 369 (1983). *See also* Restatement (Third) of Property: Wills and Other Donative Transfers §8.5 (Tentative Draft No. 3, Apr. 4, 2001) (providing that a provision in a donative document purporting to rescind a donative transfer to, or a fiduciary appointment of, any person who institutes a proceeding challenging the validity of all or part of the document is enforceable unless probable cause existed for instituting the proceeding).

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

[93] Lewin on Trusts ¶5-10 (England).

> all the holy ones on Doomsday; and, may he be taken to Satan, the devil, and to all his be damned companions, to the pit of Hell, and there suffer, with the enemies of God, without ceasing, and never bother my heirs."[94]

In the case of the trust, there are really three categories of "contest." One can contest the circumstances surrounding a trust's creation,[95] its purposes, or *how* it is being administered, or any combination thereof. Assuming that the settlor intended to impress a trust upon the property, not to make a gift to the "trustee," then it would seem inconsistent with the concept of the trust for a court to apply a "no contest" clause to the third category, *e.g.*, good-faith actions brought by beneficiaries to construe the terms of governing instruments or to remedy breaches of trust.[96] Accountability, after all, is the glue that holds the institution of the trust together.[97] Under the Uniform Trust Code, a "contest" is "an action to invalidate all or part of the terms of the trust or of property transfers to the trustee."[98] Thus, a beneficiary who in good faith brings a complaint for instructions merely to clarify the terms of the trust probably has little to worry about. On the other hand, the beneficiary should think twice before appealing whatever decision the trial court ultimately hands down, particularly if the appeal could result in a diminution of the size or scope of someone's equitable interest under the trust.[99] One court has held that merely a complaint to convert a trust into a unitrust would trigger a forfeiture under the trust's no-contest clause.[100]

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

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

[96]*See* Restatement (Third) of Property: Wills and Other Donative Transfers §8.5 cmt. (Tentative Draft No. 3, Apr. 4, 2001) (suggesting that a clause that purports to prohibit beneficiaries from enforcing fiduciary duties owed to the beneficiaries by the trustee is unenforceable). *See, e.g.*, Conte v. Conte, 56 S.W.3d 830 (Tex. App. 2001) (an action to remove trustee not being an effort to vary the settlor's intent, *in terrorem* clause not triggered when beneficiary commenced action to remove cotrustee); Boles v. Lanham, 865 N.Y.S.2d 360 (App. Div. 2008) (trust "incontestability" clause held not to have been triggered against a beneficiary when the beneficiary brought suit against the trustee for breach of fiduciary duty, the trustee having acted in bad faith in failing to make income and principal distributions to the beneficiary). *But see* Estate of Pittman, 63 Cal. App. 4th 290, 73 Cal. Rptr. 2d 622 (1998) (holding that beneficiaries' attempt to use legal proceedings to obtain a determination/clarification as to the legal character of property in a joint trust, *i.e.*, whether it was community or separate property, constituted a "contest" within meaning of broadly worded *in terrorem* clause).

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

[98]Uniform Trust Code §604 cmt. (available on the Internet at <http://www.law.upenn.edu/bll/ulc/ulc.htm>).

[99]*Cf.* Claudia G. Catalano, *What constitutes contest or attempt to defeat will within provision thereof forfeiting share of contesting beneficiary*, 3 A.L.R.5th 590 §11 (Appeal of order admitting or denying will to probate).

[100]McKenzie v. Vanderpool, 151 Cal. App. 4th 1442, 61 Cal. Rptr. 3d 129 (2d Dist. 2007). *See generally*§6.2.2.4 of this handbook (the noncharitable unitrust and the investment considerations).

Some states have statutes that enable a prospective contestant to seek an advance determination from the court as to whether a contemplated action would trigger a forfeiture of his or her equitable interest under the trust's no contest clause, assuming the trust has one.[101] In the absence of such a statute, a court might be persuaded to render an advance determination in the context of a complaint for declaratory judgment.[102]

Under the Restatement (Third) of Property, a no-contest clause is enforceable unless there was probable cause for instituting the proceeding.[103] "Probable cause exists when, at the time of instituting the proceeding, there was evidence that would lead a reasonable person, properly informed and advised, to conclude that there was a substantial likelihood that the challenge would be successful."[104] Alaska, by statute, has no such probable cause exception.[105]

What about a provision in a QTIP trust that subjects the surviving spouse's interest under the trust to the condition that he or she elect within six months of the settlor's death not to contest the trust. Would the presence of such a limited pre-acceptance no-contest clause jeopardize the QTIP election and the estate tax marital deduction?[106] Probably not. In the eyes of the IRS, that type of no-contest provision merely creates "alternatives" for the spouse; it does not create a "power to appoint" to persons other than the surviving spouse during the surviving spouse's lifetime, a power that would be fatal for marital deduction eligibility purposes.[107]

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

> Respondent contends, applying the familiar rule of strict construction where forfeiture is involved, that "contest" here means a legal opposition, pressed home to a decision, and that nothing short of this fulfills the terms of the condition subsequent. But having regard, as we must, to the controlling consideration of the purpose of the testator, can this be true? If so, then the testator contemplated permission to any disaffected heir, devisee, or legatee to use all of the machinery of the law to overthrow his wishes; to urge upon the court any of the "technical rules" which it may be thought were trespassed upon; to drag into publicity matters of the testator's private life; to assail his sanity—all to thwart "the testator's manifest purpose." And, after having done all this, if before a judicial determination has been actually rendered he has been

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[101] *See, e.g.*, McKenzie v. Vanderpool, 151 Cal. App. 4th 1442, 61 Cal. Rptr. 3d 129 (2d Dist. 2007).

[102] *See generally* §8.42 of this handbook (difference between a complaint (petition) for instructions and a complaint (petition) for declaratory judgment).

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

[104] Restatement (Third) of Property: Wills and Other Donative Transfers §8.5 cmt. c.

[105] Alaska Stat. §13.36.330 (2008).

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

[107] Priv. Ltr. Rul. 9244020.

> able to force a compromise through the fears of the other beneficiaries under the will, or, failing this, has reached the conclusion that his efforts for the destruction of the instrument will prove abortive, he may dismiss his petition, receive the benefit of the testator's bounty, and be heard to declare, "I have not contested." This cannot be.[108]

Assume the terms of a revocable inter vivos trust include an *in terrorem* provision; for whatever reason, a companion *in terrorem* provision is lacking in the settlor's pour-over will.[109] Could the trust's *in terrorem* clause be triggered by a will contest, the theory being that the will and will substitute (the revocable inter vivos trust) are parts of a single estate plan?[110] Probably not, and it should be no surprise that at least two courts have so held.[111] Because equity does not favor forfeitures, courts are inclined to construe i*n terrorem* clauses narrowly.[112]

The mere presence of an enforceable *in terrorem* clause in a trust ought not to negate a beneficiary's standing to invoke the jurisdiction of the court, provided the beneficiary's allegations of injury, causation, and "redressability" are sufficiently particularized. At least one court has so held.[1] While the presence of an enforceable *in terrorem* clause in a trust may ultimately turn out to be an effective defense to an action brought by a beneficiary to, say, reform the trust, the mere existence of such a clause cannot deprive the beneficiary of standing to bring the action in the first place.[2] Otherwise such clauses would be self-executing.

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

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

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

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

[112] Bogert, Trusts and Trustees §181.

[1] Sonntag v. Ward, 253 P.3d 1120, 1121 (2011).

[2] Sonntag v. Ward, 253 P.3d 1120, 1121 (2011).