

“NO CONTEST” CLAUSES

A “no contest” or an “in terrorem clause” refers to a provision in a will or trust that is employed to discourage a contest of the will or trust by providing that the person who “contests” will be “cut out” as a beneficiary. The beneficiary must assume a degree of risk of loss of the bequest in order to challenge the will or trust.

“In terrorem” provisions are not favored by courts, and often courts have chosen not to enforce such a provision where the court believes that the challenge was brought in good faith.

New Section 112.038 of the Texas Property Code provides that a forfeiture clause may be unenforceable under the following circumstances:

- a. Probable cause exists for bringing the action; and
- b. The action was brought and maintained in good faith.

A similar provision is found in new Section 64 of the Texas Probate Code. This new provision significantly reduces the risk assumed by a beneficiary who challenges a will or trust in the face of a “no contest” provision.

The key provision of Section 112.038 of the Texas Property Code is “maintained” in good faith. If the case is not maintained in good faith, then the in terrorem provision may be applied by the court. After discovering the facts which may justify the smaller bequest, the beneficiary may decide to drop the case in order to avoid having the court decide that the beneficiary did not maintain the action in good faith.

Is there an alternative to cutting out the beneficiary?

Instead of “cutting out” the beneficiary in the event of a challenge, the will or trust could simply provide that all the attorneys fees of defending the contest are to be charged to the contestant’s share of the estate or trust. The attorneys fees may create a significant risk of loss to the beneficiary’s share of the estate or trust that may discourage the beneficiary from contesting.

When would a beneficiary be likely to contest a will or trust?

When the beneficiary’s share of the estate under intestacy (i.e., the decedent died without a will) would be greater than under the will or trust.

How much should be given to the beneficiary to discourage a contest?

The amount would depend upon the size of the estate. If the bequest is only a fraction of what the beneficiary would receive under intestacy, then the beneficiary may be willing to assume the risk. Thus, it is important to make a gift in an amount that is large enough to discourage the beneficiary from challenging the will if the no-contest clause were applied.