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Whether the confidential relationship can be defined as a reliant relationship is determined by fact. In order to establish a reliant relationship, Plaintiffs must present evidence that shows the relationship based on special trust and confidence. For example, the donor was accustomed to being guided by the judgment or advice of the alleged wrongdoer.<sup>47</sup>

The existence of a dominant-subservient relationship is also a question of fact. As such, the person wishing to establish it must present evidence to establish that the donor was subservient to the alleged wrongdoer's dominant influence.<sup>48</sup>

State law defines the evidentiary impact of a finding of a confidential relationship. In Maryland, for example, the existence of a confidential relationship will shift the burden of proof to the donee of an inter vivos gift, requiring the donee to show that gift was not the product of undue influence. For testamentary dispositions, however, a confidential relationship only operates as one factor to show undue influence and does not shift the burden of proof.<sup>49</sup>

One commentator set out a useful checklist of things to do to ensure that the client is competent.

1. Get to know the client. . .
2. Determine the client's mental state. . .
3. Take extensive notes. . .
4. Interview the client more than once.
5. Interview the client when no one else is present.
6. Probe for fears, anxieties and unnatural reactions.
7. Discuss generally the testator's assets and take accurate notes. . .
8. Ask the client about previous physical or mental problems and the names of treating physicians or other professionals. . .
9. Determine if an earlier will exists and why changes are being made. . .<sup>50</sup>

Many estate planning clients come in as a couple. Each of these suggestions applies to those clients as a unit in most situations. If, however, there are step children and/or a second marriage involved, it may be advisable to interview each client individually or, if warranted, have each seek separate counsel.

## 2.0 CHILLING DISSENT: IN TERROREM CLAUSES

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> See *Upman v. Clarke*, 753 A.2d 4, 5 (Md. 2000).

<sup>50</sup> Dennis W. Collins, *Avoiding a Will Contest—The Impossible Dream?* 34 CREIGHTON L. REV. 7, 19–20 (2000).

## 2.1 In Terrorem Clauses or No Contest Clauses.

In terrorem or no contest clauses were traditionally favored as a method of discouraging litigation. Generally, such a clause provides that any legatee challenging a will would forfeit his or her interests under that instrument. "Such a provision is intended to frighten or terrorize any distribute from objecting ..."<sup>51</sup> The naming of these clauses, but not necessarily the impact such clauses have, has softened over time:

[T]he names of these clauses have changed over the years as the view of society and the laws have changed. Historically, these clauses were called "in terrorem" clauses, implying the terror that was supposed to be struck in the hearts of anyone who might want to challenge the testamentary instrument. This title implies that discouraging litigation will give effect to the testator's purposes. Later, these clauses were titled "no contest" clauses, a less formidable title, but still focused on discouraging litigation and giving effect to the testator's purposes. Currently, some have been naming these clauses "forfeiture" clauses, focusing on the fact that the beneficiaries will forfeit their bequest if they contest the will.<sup>52</sup>

Regardless of the name given to the clause, the purpose is to discourage potential litigation. In order for this goal to be effective, the potential litigant must be given a substantial enough bequest that he or she would be concerned about forfeiting it.

## 2.2 In Terrorem Clauses at Common Law.

At common law, no contest clauses were enforced regardless of whether there was probable cause to bring a challenge and/or whether such challenge was made in good faith. Thus, the U.S. Supreme Court upheld an in terrorem clause stating:

It is only carrying out a plain intent of the testator, and giving to the residuary devisee that which the testator intended, and forbidding the heir from taking property not designed for him ... And, when a testator declares in his will that his several bequests are made upon a condition that the legatees acquiesce in the provisions of his will, the courts wisely hold that no legatee shall, without compliance with that condition, receive his bounty, or be put in a position to use it in an effort to thwart his express purposes.<sup>53</sup>

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<sup>51</sup> Jonathan G. Blattmachr, *Reducing Estate and Trust Litigation Through Disclosure, In Terrorem Clauses, Mediation and Arbitration*, 36 ACTEC L.J. 547, 554 (2011).

<sup>52</sup> Donna R. Bashaw, *Are In Terrorem Clauses No Longer Terrifying? If So, Can You Avoid Post-Death Litigation with Pre-Death Procedures?*, 2 NAELA J. 349, 351 (2006).

<sup>53</sup> *Smithsonian Institution v. Meech*, 169 U.S. 398, 414–5, (1898).

In the *Smithsonian Institution* case, there was little question but that the will challenge was in good faith. The testator's wife had legal title to certain real estate and consequently when she died intestate, "[p]rima facie, therefore, the title passed to her heirs."<sup>54</sup> The testator left his wife's heirs who would, by title, receive the real property, a cash bequest subject to a no contest clause. He then specifically devised the real estate subject to the cloud on title to the Smithsonian Institution claiming that the property was subject to an oral trust between his deceased wife and himself. He claimed that this oral trust passed title to him at her death thereby permitting him to make the charitable devise.<sup>55</sup>

This unblinking enforcement of no contest clauses in Washington, D.C. apparently continues to this day: no contest clauses still are enforced "notwithstanding good faith and probable cause and making the contest."<sup>56</sup>

### 2.3 The Softening of the In Terrorem Clause if Probable Cause Exists for the Contest.

The Uniform Probate Code and the Restatement (Third) of Property argued for the modification of common law to provide that in terrorem clauses would be enforceable unless probable cause exists for instituting the proceedings.<sup>57</sup>

Most states follow the Uniform Probate Code and Restatement (Third) of Property approach.<sup>58</sup>

#### 2.3.1 Probable Cause for In Terrorem Clause Purposes.

The Restatement (Third) of Property defines probable cause as follows:

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<sup>54</sup> *Smithsonian Institution*, 169 U.S. at 402.

<sup>55</sup> There was no specific discussion of the Statute of Frauds so presumably the jurisdiction (Washington, D.C.) had not extended the Statute of Frauds to oral trusts of real property.

<sup>56</sup> *Ackerman v. Genevieve Ackerman Family Trust*, 908 A.2d 1200 (D.C. Ct. App. 2006).

<sup>57</sup> See UPC § 2-517; RESTATEMENT (THIRD) OF PROPERTY § 8.5.

<sup>58</sup> See T. Jack Challis & Howard M. Zaritsky, *ACTEC State Survey; No-Contest Clauses* (3/24/12). The survey lists 22 states that follow the Uniform Probate Code and at least 5 others that generally adopt that approach. Although somewhat dated, the state survey remains the most comprehensive list of how the various states treat the subject. California by statute will only enforce an in terrorem clause if a "direct contest" is brought without probable cause. See CAL. PROB. CODE § 29-1-6-2. Direct contests involve an attempt to invalidate a will based on undue influence, duress, lack of capacity and the other traditional caveat grounds. The New York statute tilts toward enforceability of in terrorem clauses, however, by statute the prospective caveator is entitled to examination of the will proponent's witnesses, the person who prepared the will, the nominated fiduciaries and others as a preliminary to a decision whether to file an objection to the will. See McKinley's EPTL § 3-3.5(b)(3)(D). Also in Florida in terrorem clauses are unenforceable. FLA. STAT. § 732.517. Likewise, in Indiana in terrorem clauses are unenforceable. IND. CODE § 29-1-6-2.

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. A factor that bears on the existence of probable cause is whether the beneficiary relied upon the advice of independent legal counsel sought in good faith after a full disclosure of the facts. The mere fact that the person mounting the challenge was represented by counsel is not controlling, however, since the institution of a legal proceeding challenging a donative transfer normally involves representation by legal counsel.<sup>59</sup>

Because the right to contest a will is statutory, that right may be lost by failure to contest the will within the period of the statute of limitations. Generally, the statute of limitations is triggered by the notice of the will being admitted to probate but the limitation period may be quite short—often much less than one year and sometimes as short as three months after notice.<sup>60</sup> In Maryland, for example, the time for filing a caveat is six months from notice.<sup>61</sup> As noted in the definition of probable cause under the Restatement (Third) of Property, the probable cause must exist at the time of instituting the procedure which, given the short statutes of limitation that often apply, can be somewhat tricky.

The Restatement (Third) of Property definition of probable cause differs somewhat from the use of probable cause in criminal cases for issuing warrants. In an Arizona case, for example, the appellate court distinguished probable cause in a criminal context which is "based on substantial evidence" and held, using the Restatement, that it is the evidence "possessed by the plaintiff when she instituted a lawsuit."<sup>62</sup> In that case, the Supreme Court of Arizona reversed the intermediate court because it was based on determinations eventually made at trial. Thus, the standard adopted by the Supreme Court of Arizona for determining whether a plaintiff has probable cause to bring a will contest, and therefore allows the plaintiff to escape the punishment of a no contest clause, requires the trial court to "refer to the evidence known at the time the contest was initiated" to determine whether a "reasonable person, properly informed and advised" would conclude that there is a "substantial likelihood of success in the contest period."<sup>63</sup>

When a contestant fails to provide evidence, is unhappy with his or her legacy under the will, or only suspects or supposes the will was a product of fraud or undue influence, the plaintiff lacks probable cause for a will contest and the in terrorem clause is enforceable.<sup>64</sup>

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<sup>59</sup> RESTATEMENT (THIRD) OF PROPERTY § 8.5 *cmt c.*

<sup>60</sup> EUNICE L. ROSS & THOMAS J. REED, WILL CONTESTS § 12:1 at n. 25 (Thomson Reuters 2d ed. updated 2017).

<sup>61</sup> MD. CODE ANN. EST. & TRUSTS § 5-207.

<sup>62</sup> *In Re Estate of Shumway*, 3 P.3d 977, 1066 (Ariz. Ct. App. 1999) rev'd in part; aff'd in part 9 P.3d 1063 (Ariz. 2006).

<sup>63</sup> *In Re Estate of Shumway*, 3 P.3d at 1067.

<sup>64</sup> *Russell v. Wachovia Bank*, NA, 633 S.E.2d 722, 727 (S.C. 2006) (enforcing in terrorem clause because family discord, strife and a less-than-favorable inheritance does not constitute facts that



The determination of whether a contestant has sufficient probable cause to file a will contest would appear to be quite a subjective determination (regardless of whether it is cast in the terms of being a "reasonable" person standard). Courts have found that a plaintiff bringing a will contest has a substantial likelihood of success proving his or her claims, and therefore probable cause, when (i) a decedent was in a confidential relationship at the time the will was written, (ii) the individual in the confidential relationship with the decedent receives a greater portion of the estate, and (iii) the decedent is shown to be a person easily susceptible to direction.<sup>65</sup>

#### 2.4 In Terrorem Clauses Applying to Revocable Trusts.

The trend has been to treat in terrorem clauses in trusts the same as they are treated in wills. Currently most jurisdictions have addressed in terrorem clauses in trusts either by statute or in case law.<sup>66</sup> Some states address both wills and trusts in the same statute,<sup>67</sup> others have parallel statutes addressing wills and trusts,<sup>68</sup> and others argue that, because trusts are used as will substitutes, the same rules regarding in terrorem clauses should apply.<sup>69</sup> Most jurisdictions have addressed the enforceability of in terrorem clauses in trusts, and the result is to apply substantially the same rules as exist in that jurisdiction's probate code whether by statute or case law.

#### 2.5 Use of In Terrorem Clauses in Estate Planning.

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produce a substantial likelihood of succeeding on claims); *Hammer v. Powers*, 819 S.W.2d 669 (Tx. Ct. App. 1991) (enforcing in terrorem clause because plaintiff's case was dismissed with summary judgment for failure to plead or present evidence); *In Re Estate of Simpson*, 595 A.2d 94, 99–100 (Pa. 1991) (finding that even though decedent was in a confidential relationship, plaintiff did not have probable cause for a lawsuit because it was based on his inability to fathom any reason why the decedent would change her will, he had no evidence to substantiate his suspicions and brought the contest because he did not get what he wanted under the will).

<sup>65</sup> *In Re Estate of Shumway*, 9 P.3d at 1067–69 (Ariz. 2000) (holding plaintiff had substantial likelihood of succeeding on her will contest claims because decedent was in a confidential relationship with the bookkeeper receiving a portion of the estate, was legally blind, may have been asleep when the will was read to him and did not participate in the revision of his will); *In Re Friends Estate*, 58 A. 853, 857 (Pa. 1904) (holding plaintiff had a substantial likelihood of succeeding on her will contest claims because the decedent was weak and dependent, the decedent's son had influence over her, the influential son had contempt for other members of the family and received a larger portion of the estate).

<sup>66</sup> See Generally T. Jack Challis et al., *State Laws: No-Contest Clauses* (Mar. 24, 2012).

<sup>67</sup> See 12 DEL. STAT. § 3329; HAW. REV. STAT. § 560:3-905; 20 PA. CON. STAT. § 2521.

<sup>68</sup> See N.H. REV. STAT §§ 551:22(II) & 564-B:10-1014.

<sup>69</sup> In an unpublished memorandum opinion the Superior Court of Connecticut applied the rules dealing with wills to trusts by putting "(trust)" after each mention of a will. 2015 Conn. Super. LEXIS 413. Other courts address the issue more directly and explain that, when trusts are used as will substitutes, in terrorem clauses in trusts should be governed by the same rules as wills. See *Keener v. Keener*, 682 S.E.2d 545, 548 (Va. 2009).

The in terrorem clause is a tool but by no means a provision that should be mindlessly put in every estate plan. Often clients wish to disinherit a child or someone else who may be a natural object of the client's bounty. In those cases, the client may not wish to leave that person a sizeable bequest simply to construct a penalty if that person challenges the estate planning. In those cases, the client should simply disinherit the individual by naming the individual as not being left anything under the will. This is preferred over leaving the individual a nominal amount because such a bequest may be viewed as an insult and trigger the unwanted challenge.

If the client wishes to use an in terrorem clause, it is best to tailor it to the situation. It may be more helpful to apply the in terrorem clause to only one specific bequest under the will and not the entire document. Narrowing the scope of the in terrorem clause is helpful because neither the testator nor the drafting attorney can foresee the future and whether the favored beneficiaries may wish to institute a court proceeding for some reason. Additionally, the in terrorem clause should be tailored to address specific types of challenges. While the testator or settlor may wish to deter challenges to the validity of the will or trust, he or she may not wish to deter challenges to a trustee or executor's actions.

## 2.6 Scope of In Terrorem Clause.

One motivation for tailoring the scope of an in terrorem clause is that overly-broad in terrorem clauses risk being unenforceable on public policy grounds. One argument against in terrorem clauses is that they block access to the judicial system and are thus viewed by many jurisdictions with disfavor.<sup>70</sup>

Here is an example of an overly-broad in terrorem clause encountered in practice. We would recommend not using it. It demonstrates how broad these clauses are drafted and how problematic they can be:

Notwithstanding the "Resolution of Disputes" provisions under Section \_\_ of Article \_\_ of my Trust, if any devisee, legatee, or beneficiary under my Trust or any amendment thereto no matter how remote or contingent such beneficiary's interest appears, or any of my legal heirs, or any person claiming under any of them, directly or indirectly, does any of the following, then in that event I specifically disinherit such person or persons, and all such legacies, bequests, devises, and interest given to such person or persons under my Trust, or any amendment thereto, or any other Trust document created by me at any time, shall be forfeited and shall be distributed as provided elsewhere herein as though such person or persons had predeceased me without issue:

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<sup>70</sup> See *Rodriguez v. Gavette (In re Estate of Shumway)*, 3 P.3d 977, 984–85 (Ct. App. Div. 1 1999), review granted in part, (Mar. 14, 2000) and opinion vacated on other grounds in part, 9 P.3d 1062 (Az. 2000).

- a) Unsuccessfully challenges the appointment of any person named as a trustee in my Trust Agreement, or any amendment thereto, or unsuccessfully seeks the removal of any person acting as a trustee;
- b) Objects in any manner to any action taken or proposed to be taken in good faith by my Trustee under my Trust Agreement, or any amendment thereto, whether my Trustee is acting under court order, notice of the proposed action, or otherwise, and said action or proposed action is later adjudicated by a court of competent jurisdiction to have been taken in good faith;
- c) Objects to any construction or interpretation of my Trust Agreement, or any amendments thereto, or to the provisions of either, that is adopted or proposed in good faith by my Trustee, and set objection later adjudicated by a court of competent jurisdiction to be an invalid objection;
- d) Claims entitlement to (or an interest in) any assets alleged by my Trustee to belong to the Probate or Trust Estate, whether such claim is based upon a community or separate property right, Marvin rights, a contract or other right or device, and said claim is later adjudicated by a court of competent jurisdiction to be invalid;
- e) File a creditor's claim against the assets of the Probate or Trust Estate and such claim is later adjudicated by a court of competent jurisdiction to be invalid;
- f) Anyone, other than me, attacks or seeks to impair or invalidate (whether or not any such attack or attempt is successful) any designation of beneficiaries for any insurance policy on my life or any designation of beneficiaries for any pension plan, Keogh, SEP, or IRA;
- g) In any other manner contest my Trust Agreement, or any amendment thereto, executed by me, or in any other manner, attacks or seeks to impair or invalidate any of my Trust's provisions; or
- h) Conspires with or voluntarily assist anyone attempting to do any of the above acts.

The drafter of this clause failed to tailor the clause to address a specific bequest, a specific beneficiary, a specific type of action or actions brought without good faith or probable cause.<sup>71</sup>

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<sup>71</sup> For examples of good in terrorem clauses see T. Jack Challis et al., *Not so Fast: Drafting, Planning, and Litigating no Contest Clauses*, American Law Institute-American Bar Association Continuing Legal Education, September 13–14, 2010.

Arguably, this provision violates the non-modifiable UTC good faith standard. The provision purports to punish only if the contestant objects "to my action taken or proposed to be taken in good faith by (the) Trustee." This standard is the contract good faith standard not the standard applied under the common law or the UTC.<sup>72</sup> Under the UTC, regardless of the terms of the instrument, a trustee has a duty "to act in good faith and in accordance with the terms and purposes of the trust and in the interests of the beneficiaries." By rooting the good faith obligation to the terms and purposes of the trust and the interests of the beneficiaries, the UTC, in effect, imposed fiduciary standards to good faith. This, in turn, obligates the trustee to act reasonably.<sup>73</sup> Under the contract standard of good faith—which seems to be the standard under the above example language—good faith is the lowest standard under the law: the absence of subjective bad faith. Read literally, the broad language punishing any beneficiary objecting to an action taken in good faith by the trustee violates the UTC immutable standard as well as common law standard governing trustees.<sup>74</sup>

A declaratory judgment action may be used to determine whether an overly broad in terrorem clause is unenforceable. The purpose of the uniform declaratory judgement act was to permit "parties who are uncertain as to their rights and duties, to ask a final ruling from the court as to the legal effect of an act before they have progressed with it to the point where any one has been injured".<sup>75</sup> A declaratory judgment action to determine the validity is not a violation of the clause.<sup>76</sup> Because of the short filing requests required for most caveat proceedings, a declaratory judgment action may not be practical. In the case of potential actions against a personal representative or trustee for actions taken or not taken during administration, however, it may be a viable approach.

Aside from it's possible unenforceability, however, the broad, sweeping in terrorem clause runs the risk of creating unintended consequences. It might chill favored beneficiaries from seeking to monitor and/or control a faithless fiduciary.

Best practice is to tailor an in terrorem clause to fit the exact situation feared by the settlor. More tailored clauses would be as follows:

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<sup>72</sup> Frederick R. Franke, Jr., *Resisting the Contractarian Insurgency: The Uniform Trust Code, Fiduciary Duty, and the Good Faith in Contract*, 36 ACTEC L.J. 517 (2010).

<sup>73</sup> *Id.* at 530–33. See also RESTATEMENT (THIRD) OF TRUSTS § 50 (2003).

<sup>74</sup> See *McNeil v. McNeil*, 798 A.2d 503 (Del. Supr. Ct. 2002) (holding that a settlor who attempts to create a trust without effective accountability is not a trust). Also, "[a] trust necessarily grants rights to the beneficiary that are enforceable in equity." GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, *THE LAW OF TRUSTS AND TRUSTEES*, § 974 (3d. ed. 1967).

<sup>75</sup> Uniform Declaratory Judgement At (Prefatory Note)(1922).

<sup>76</sup> *Hicks v. Rushin*, 185 S.E. 2d 390, 392 (Ga. 1971) ("The search for the true meaning of a will is not an attack upon it.") See also *In re: Est. Burkhalter*, 806 S.E. 2<sup>nd</sup> 875 (Ga. 2017). Also see "What Constitutes Contest or Attempt to Defeat Will Within Provision thereof Forfeiting Share of Contesting Beneficiary". 3 A.L.R 5<sup>th</sup> 590 at § 15(a) (Originally published 1992) (It has been uniformly held that an action for construction of a will does not trigger an in terrorem clause).

Settlor understands that, by making gifts or other lifetime transfers to certain family members in the past, she has made other beneficiaries of this trust unhappy. Further, Settlor understands that by providing for distribution of life insurance proceeds and retirement benefits outside of this trust to certain beneficiaries, some other beneficiaries may believe that they have been treated unfairly. Settlor wishes to confirm that she intends to give more assets under this trust and certain non-trust assets to [*names of favored beneficiaries*] than to other beneficiaries and is concerned that the beneficiaries not so favored may wish to contest this trust. In the event that these less favored beneficiaries should choose to challenge the validity of this trust instrument and/or the distributions contained herein or distributions made to beneficiaries outside this trust, then Settlor intends that the provisions for forfeiture under the no contest clause of this trust shall apply immediately and without exception.

\* \* \*

Settlor does not have any less love or affection for [*names of less favored beneficiaries*] but has made substantial payments to him during Settlor's lifetime for drug rehabilitation programs and his other needs. According, Settlor includes the following no contest clause to deter such less favored beneficiary from contesting the additional gifts at Settlor's death to [*names of favored beneficiaries*] and their descendants.<sup>77</sup>

An alternative to an in terrorem clause is, of course, straight disinheritance. Best practice is to name the excluded heirs and simply state that they are receiving nothing under the instrument. Often the older practice of leaving such excluded heirs a small bequest (\$10) was seen as an insult that could trigger the challenge.<sup>78</sup>

### **3.0 KEEPING BENEFICIARIES AT BAY: SETTLOR DESIGNATED SURROGATE BENEFICIARY REPRESENTATIVES.**

#### **3.1 Background.**

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<sup>77</sup> T. Jack Challis et al., *Not so Fast: Drafting, Planning, and Litigating no Contest Clauses*, American Law Institute-American Bar Association Continuing Legal Education, September 13-14, 2010.

<sup>78</sup> The drafting lawyer should detail in his or her notes why the heir is being disinherited. Reasons should not be in the instrument so as not to generate a rebuttal and a basis for a contest. Also consider the, albeit rare, possibility of defamation. See Paul T. Whitcombe, *Defamation by Will: Theories and Liabilities*, 27 J. MARSHALL L. REV. 749 (1994).

Except as "permissibly modified by the terms of the trust," the trustee has affirmative duties to keep beneficiaries reasonably informed as to the existence of the trust, of a beneficiary's status as a beneficiary and his or her right to obtain information concerning the operation of the trust.<sup>79</sup>

A beneficiary's right to information concerning aspects of the trust and its administration, of course, is important because it notifies the beneficiary of his or her right to enforce the trust "for only by being informed can the beneficiaries know of and enforce their interests."<sup>80</sup> Thus, the UTC originally provided non-modifiable rights to information to certain beneficiaries.<sup>81</sup> As various states have considered adoption of the information and reporting requirements under the UTC, "a majority of the adopting states have made changes to these provisions [the information and reporting requirements] in a nonuniform way."<sup>82</sup> As modified in 2002, the UTC bracketed the mandatory notice/information rights to signal that it might be changed by an enacting state.

Some states have modified the notice/information obligations of a trustee by removing their mandatory nature altogether. These statutory changes may "have unwisely invited the drafting of trusts that appear to make the trustee accountable to no one, which will likely result in litigation over whether the settlor really intended to create a trust."<sup>83</sup>

### 3.2 Drafting to Keep "Beneficiaries in the Dark."<sup>84</sup>

In states which have adopted but modified the UTC, there may be an option for the settlor to eliminate or reduce a beneficiary's right to information. One purpose, of course, is to place barriers on a beneficiary enforcing his or her rights to trust benefits.<sup>85</sup>

Each state takes a different approach, so the drafting attorney must consult his or her statute. Some states have eliminated the mandatory requirement altogether.<sup>86</sup> In at least one of

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<sup>79</sup> RESTATEMENT (THIRD) TRUSTS § 82 (2007).

<sup>80</sup> David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 57 MO. L. REV. 143, 199 (2002). See also *McNeil v. McNeil*, 798 A.2d 503 (De. 2002) (highlighting the importance of information to a beneficiary who was under the impression that he only had a remainder interest when, in fact, he was a current discretionary income beneficiary).

<sup>81</sup> See UTC § 105(b); UATC § 813(a) and (c).

<sup>82</sup> Kevin D. Mallard, *The Trustee's Duty to Inform and Report Under the Uniform Trust Code*, 40 REAL PROP. PROB. & TR. J., 373, 383 (2005).

<sup>83</sup> *Id.* at 395 (noting that Kansas, Tennessee, Utah, and Wyoming have removed the trustee's duty to inform and report).

<sup>84</sup> The title of this section was lifted from Cindy Basham, *Shedding Light on Keeping Beneficiaries in the Dark*, 89 FLA. B. J. 94 (2015) which discusses Florida's trust notification requirement.

<sup>85</sup> There are, of course, more positive reasons to keep beneficiaries in the dark than to eliminate enforcement—knowledge of the trust might "demotivate" a beneficiary from being productive, for example. See Mallard, at 393.

<sup>86</sup> For more information on what different states have adopted, see Lauren Z. Curry, *Agents in Secrecy: The Use of Information Surrogates in Trust Administration*, 64 VAND. L. REV. 925, n. 55–85 (2011).

those states, the courts imposed a duty of a trustee to supply information regardless of the terms of the trust.<sup>87</sup> Other states have taken a middle path and substituted the requirement to give information to the beneficiary for a provision that permits the settlor to appoint a surrogate to receive such information on behalf of the beneficiary. The District of Columbia, for example, permits a settlor to designate a person to receive information, notice and reports in lieu of the beneficiary.<sup>88</sup> Such surrogate must "act in good faith to protect the interests of the beneficiaries ..."<sup>89</sup> Good faith is a contract standard of care, not fiduciary standard of care.<sup>90</sup>

Eliminating the requirement to provide information to a beneficiary begs the question of how a trustee, who possess the power to make discretionary distributions to an uninformed beneficiary, can exercise his or her discretion in making a distribution without tipping off the beneficiary of his or her rights under the trust.<sup>91</sup>

Maryland permits a surrogate who can only be held liable by the beneficiary if the designated representative is shown "by clear and convincing evidence to have been in bad faith with respect to the beneficiary."<sup>92</sup> Unlike Washington, D.C., Maryland did not modify the mandatory requirement to supply a qualified beneficiary with certain information if the beneficiary requests it.<sup>93</sup>

The surrogate approach is seen as a compromise between the broad requirements to disseminate information imposed by the UTC and the complete waiver of those requirements adopted by many states.<sup>94</sup> The surrogate approach is not without its flaws. By inserting an additional individual who is not a fiduciary between the trustee (the fiduciary) and the beneficiary, the surrogate approach may reduce the fiduciary accountability associated with trusts. As long as the trustee provides appropriate notice, information and reports to the surrogate and the surrogate abides by the—lower, non-fiduciary—standard of care applicable to his or her role, the beneficiary may be without recourse. It seems that the surrogate approach alleviates the trustee of accountability and may even destroy the trustee-beneficiary relationship. Certainly courts will be resolving these issues in the future.

#### **4.0 BEATING THEM TO THE PUNCH: ANTEMORTEM PROBATE.**

A few states have enacted statutes permitting pre-death probate of a will. The perceived benefits flow from the fact that the pivotal witness, the testator or testatrix, is available to rebut

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<sup>87</sup> *Wilson v. Wilson*, 690 S.E.2d 710, 711 (N.C. Ct. App. 2010).

<sup>88</sup> D.C. CODE § 19-1301.05 (2001).

<sup>89</sup> *Id.*

<sup>90</sup> Frederick R. Franke, Jr., *Resisting the Contractarian Insurgency: The Uniform Trust Code, Fiduciary Duty, and Good Faith in Contract*, 36 ACTEC L.J. 517 (2010).

<sup>91</sup> *See* Mallard, at 395.

<sup>92</sup> MD. CODE ANN., EST. & TRUSTS § 14.5-306.

<sup>93</sup> MD. CODE ANN., EST. & TRUSTS § 14.5-105(11). This is also the approach taken by the Missouri statute.

<sup>94</sup> Lauren Z. Curry, *Agents in Secrecy: The Use of Information Surrogates in Trust Administration*, 64 VAND. L. REV. 925 (2011).

any charge of lack of capacity and/or undue influence. Antemortem probate also has the benefit of flushing out technical flaws that may exist from improper execution while corrective action can still be taken.<sup>95</sup>

#### 4.1 The Antemortem Jurisdictions.

Eight states have antemortem statutes to validate wills: Alaska,<sup>96</sup> Arkansas,<sup>97</sup> Delaware,<sup>98</sup> Ohio,<sup>99</sup> Nevada,<sup>100</sup> New Hampshire,<sup>101</sup> North Carolina,<sup>102</sup> and North Dakota.<sup>103</sup> The Alaska and Nevada statutes also permit pre-death validation of trusts. New Hampshire<sup>104</sup> and Delaware<sup>105</sup> permit the validation of trusts by separate statute.

#### 4.2 Basic Patterns of State Antemortem Statutes.

Statutes allowing for antemortem validation of wills typically allow only the testator to bring the action, and require the testator to serve all beneficiaries named in the will and all persons who would inherit if the testator died intestate. Some states also allow the testator's legal representative to commence the action.<sup>106</sup> Delaware has a unique system that allows the testator to give notice to any or all beneficiaries, interested persons, or anyone else and then allows those individuals a specific amount of time in which to contest the will.

The relevant trust statutes mirror those applicable to wills. Alaska and Nevada allow the settlor and/or trustee to commence an action, New Hampshire allows a settlor to commence an action, and Delaware permits a trustee to send notice that will bind any recipient who does not respond within 120 days of the date of the notice.

#### 4.3 Pros and Cons of Using Antemortem Statutes.

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<sup>95</sup> See Aloysius A. Leopold and Gerry W. Beyer, *Ante-Mortem Probate: A Viable Alternative*, 43 ARK. L. REV. 131, 133–34 (1990) ("From the outset, readers should be aware that the purpose of this article is neither to suggest that post-mortem model of probate be abolished, nor that antemortem probate is a panacea. Rather, it is to demonstrate that antemortem probate is a viable technique which could serve to reduce the problematic side of the current post-mortem system and provide a wide-range of benefits to a significant segment of the population.").

<sup>96</sup> ALASKA STAT. ANN. §§ 13.12.530–590 (West 2015).

<sup>97</sup> ARK. CODE ANN. § 28-40-202, 203 (West 2015).

<sup>98</sup> 12 DEL. C. § 1311.

<sup>99</sup> OHIO REV. CODE ANN. § 2107.081–.085 (West 2015).

<sup>100</sup> NEV. REV. STAT. § 30.040(2).

<sup>101</sup> N.H. REV. STAT. 552:18.

<sup>102</sup> N.C. GEN. STAT. § 28A-2B-1.

<sup>103</sup> N.D. CENT. CODE § 30.1-08.1-01.

<sup>104</sup> N.H. REV. STAT. § 564-B:4-406(d).

<sup>105</sup> 12 DEL. C. § 3546(a).

<sup>106</sup> Alaska and Nevada.



The argument favoring antemortem probate is that it permits the best evidence, the testimony of the testator, to be presented:

No matter how sane, competent, and lucid a testator may be or how strong his desire that his estate be administered by trusted persons, our current system of post-mortem probate cannot guarantee a testator that his intentions and instructions will be carried out in spite of all the expense and caution exerted. The post-mortem probate system does not offer a true and effective method to probate a will nor does it test the validity of the intentions expressed within it because the best evidence, the testimony of the testator, is unavailable. Post-mortem probate creates a situation in which excluded heirs are invited to challenge the will and use the testator's expressed intentions to destroy the instrument, question the giver's sanity, and line their own pockets with property that was never intended to be theirs. Post-mortem probate law is encumbered with antiquated presumptions, procedures, and traditions, which by resisting statutory alteration, are sure to frustrate testamentary intent and reveal with shining clarity the need for an alternative.<sup>107</sup>

Even though antemortem statutes appear to be helpful, they do have their pitfalls. Antemortem probate only creates a valid, unchallengeable document if notice and an opportunity to challenge is given the testator's heirs. Many elderly or ill clients who disinherit a child or other descendant may not want to bring the contest to a head or confront the disinherited individual. Given that most vulnerable documents contain "unnatural" plans for disposition, many clients may never want to go public with the plan.

Lack of confidentiality is more of a problem for the testators attracted to antemortem probate. "Obviously," wrote Fellows, "the more atypical the distribution, the more vulnerable the will to claims of mental incapacity, fraud, or undue influence." Scholars that criticize the present system say that those with "unnatural" dispositions—people whose estate plan does not conform to majoritarian values—will benefit the most from antemortem probate. A testator would not want to display certain unnatural dispositions for everyone to see. A testator could have an illegitimate child whose existence is not known to the family. It is also relatively common for a testator to leave a gift to someone whom they feel has been wronged in the past. Every gift in a will has a story and many testators would prefer to keep those stories private. This is especially true where the very reason that the testator

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<sup>107</sup> Leopold & Beyer at 137.

chooses antemortem probate because she fears an unnatural gift might otherwise be invalidated.<sup>108</sup>

#### 4.3 "Backdoor" Antemortem Probate via Guardianship Litigation.

The common law provided that the validity of a will could not be adjudicated pre-mortem because prior to a testator's death, there are no heirs and consequently no will.<sup>109</sup> Although this principle may have been black letter law at one time, increasingly, estate planning documents have been subject to antemortem challenges in guardianship proceedings, where heirs and even the potential ward may address the validity or invalidity of a will or other document. Of course, a contested guardianship does not permit attorneys or clients to employ the proactive measures that conventional estate planning provides.

A California case, for example, effectively determined the validity of a will and trust under the surrogate judgement provisions for conservator that later estopped a post-death challenge to those instruments.<sup>110</sup> Likewise, a Pennsylvania case held that the validity of a will and trust could be determined in a declaratory judgment action that had been filed prior to the testator's/grantor's death (although the testator/grantor died during the pendency of the declaratory judgment action).<sup>111</sup>

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<sup>108</sup> Jacob Arthur Bradley, *Antemortem Probate is a Bad Idea: Why Antemortem Probate Will Not Work and Should Not Work*, 85 MISS. L.J. 1431, 1462 (2017) (quoting Mary Louise Fellows, *The Case Against Living Probate*, 78 MICH. L. REV. 1066, 1070 (1980)).

<sup>109</sup> See generally *Cowan v. Cowan*, 254 S.W.2d 862 (Tex. Civ. Ct. App. 1952).

<sup>110</sup> *Murphy v. Murphy*, 164 Cal. App. 4th 376 (Cal. Ct. App. 2008), as modified on denial of reh'g (1/22/08), review denied, 2008 Cal. LEXIS 10879 (Cal., Sept. 10, 2008).

<sup>111</sup> *In Re Mampe*, 932 A.2d 954 (Pa. 2007). (using the Declaratory Judgment Act to invalidate a will and revised revocable trust). See also *In Re Guardianship of E.N.*, 877 N.E.2d 795 (Ind. 2007) (finding that the Indiana guardianship estate planning statute did not permit crafting a disposition plan to take effect after the death of the ward); *Peyton v. Longo (In Re Davis)*, 954 So. 2d 521 (Miss. App. 2007).