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To Contest or Not: Drafting and Litigating No-Contest Clauses

by Elizabeth T. Meck and Morgan M. Wiener

This article discusses current law on no-contest clauses. It includes suggestions for attorneys who draft and litigate no-contest clauses and considers the risks of litigation involving these provisions.

Property owners are generally free to dispose of their property at death outright or in trust, in whole or in part, as they see fit. This alienability is subject to statutory rights afforded to surviving spouses, claims of creditors (including taxing authorities and dependents), and prohibitions of public policy that have been recognized in equity.[1]

Fundamental to the freedom to dispose of one's property at death is the right to impose conditions on such transfers that restrict or limit the timing, nature, or extent of the recipient's ownership of the property.[2] The in terrorem or "no-contest clause" has long been recognized as a condition intended to ensure that the settlor's or testator's wishes are honored by thwarting the likelihood of an attack on the dispositive instrument.[3] A no-contest clause typically provides that a beneficiary or devisee will forfeit benefits under the document if he contests the validity of the document or any of its provisions. Generally, no-contest clauses in wills or trusts are held to be valid and to not violate public policy.[4]

While recognized as a valid condition on a bequest, the no-contest clause is also criticized as a condition that impairs legitimate beneficiaries from addressing a perceived wrong in the execution or drafting of testamentary documents.[5] Therefore, while no-contest clauses can be enforced in nearly all jurisdictions,[6] including Colorado,[7] courts attempt to balance the rights of the testator and the beneficiary. As a result, enforcement of these clauses usually hinges on (1) whether the contesting party meets the objective standard of having probable cause[8] to bring an action at the time that party initiated the action, and (2) in a minority of jurisdictions, whether the party raised the claim in good faith.[9] Further, although courts generally disfavor forfeiture,[10] enforcement of these clauses frequently varies depending on how broadly the provision was drafted and whether the contesting party's actions constitute an attack on the dispositive instrument or provision.

Given the rising amount of trust and estate litigation and the frequency of post-mortem changes to estate plans,[11] estate planning clients are increasingly interested in including these clauses to ensure that their estate plans will remain unchanged after their death. The no-contest clause has become one of the most effective tools an estate planning attorney can incorporate into dispositive instruments such as wills and trusts to prevent challenges to the plan.[12] Therefore, estate planning attorneys should draft clauses precisely, to ensure that enforcement is consistent with the client's goals and expectations. Litigators can also take steps to protect against many of the risks to clients and themselves that are inherent in contesting the dispositive instrument.

This article discusses current law regarding no-contest clauses both in Colorado and nationally, how courts enforce no-contest clauses, considerations for attorneys drafting no-contest clauses, and the risks of litigation involving these provisions.

Colorado Law on No-Contest Clauses

Similar to nearly all other states, Colorado permits enforcement of no-contest clauses subject to "the probable cause exception." This exception provides that the clause will be enforced if the contesting party lacked a reasonable belief, based on sufficient information and advice, that the claim would be successful. The probable cause exception is set forth in CRS § 15-12-905, which states that 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 if probable cause exists for instituting proceedings."[13]

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The Colorado Court of Appeals first interpreted CRS § 15-12-905 in the oft-cited case *In re Estate of Peppler*.[14] In *Peppler*, the decedent had executed a will in 1984 devising most of his estate to his son (the 1984 will). After the decedent's death, his granddaughter attempted to admit a subsequent will to probate (the 1992 will).[15] The 1992 will named the decedent's granddaughter as the personal representative and provided a significantly larger bequest to his daughter than in the 1984 will. It came to light that the 1992 will was procured by the decedent's daughter and was drafted by an attorney who never met the decedent. Objections were filed regarding admission of the 1992 will, including undue influence and lack of testamentary capacity. The district court denied admission of the 1992 will, admitted the 1984 will, and appointed the personal representative nominated under the 1984 will. The personal representative then petitioned the court for instructions regarding the enforceability of the no-contest clause contained in the 1984 will, which provided that any beneficiary who "*directly or indirectly* initiates legal action to contest or attack the validity of this will or becomes an adverse party in a proceeding for its probate" would forfeit the beneficiary's interest under the will.[16] The district court instructed the personal representative not to enforce the no-contest clause, finding that the daughter had been "well-intended" but had been "badly advised and improperly influenced by her then-attorneys."[17] The personal representative appealed.

The Court of Appeals adopted the definition of probable cause for will contests from the *Restatement (Second) of Property*: "the existence, *at the time of the initiation of the proceeding*, of evidence which would lead a reasonable person, properly informed and advised, to conclude that there is a substantial likelihood that the contest or attack will be successful."[18] The Court concluded that the attempt to admit the 1992 will did constitute an attack on the 1984 will and that a finding of undue influence did not preclude applying the probable cause exception; the court remanded the case to determine whether the probable cause exception applied.[19]

On remand, and viewing the evidence regarding testamentary capacity and undue influence from the perspective of a "reasonable person, properly informed and advised," the district court determined that there could not have been a reasonable understanding that the 1992 will would have been properly admitted to probate over the 1984 will.[20] Accordingly, the probable cause exception did not apply, the no-contest clause was triggered, and the decedent's daughter forfeited any interest she had under the 1984 will.[21]

Until recently, *Peppler* was the only Colorado case providing a detailed discussion of no-contest clauses. However, the Court of Appeals recently applied *Peppler* and the *Restatement (Second) of Property* and interpreted CRS § 15-12-905 in *In re Estate of Sanstead*.[22] In this factually dense and complex case, the Court cited to *Peppler* in explaining that "[c]ourts generally do not enforce an in terrorem (no-contest) clause when a beneficiary acts in good faith and has probable cause to challenge the will."[23] The *Sanstead* Court ultimately enforced a no-contest clause, however, even though such clause was not explicitly in the will admitted to probate but was contained in a revocable trust incorporated by reference into the will. Specifically, restating the definition of probable cause in *Peppler* and the *Restatement (Second) of Property*, the *Sanstead* Court found that a no-contest clause, *whether contained in a will or in a trust*, will be enforced unless "a reasonable person, properly informed and advised would have concluded that a challenge [to a will or a trust] would succeed."[24]

No-Contest Clauses in Other States

Colorado is not unique in enforcing no-contest clauses. Nearly all states permit the enforcement of some form of no-contest clauses.[25] Currently, the majority of states have adopted a version of the Uniform Probate Code, which provides that no-contest clauses are enforceable subject to the probable cause exception.[26] The majority of these states have also extended the enforcement of no-contest clauses to those contained in trusts.[27] A minority of states also require that the contest be brought in good faith, explicitly requiring not only a determination of the objective probable cause standard, but also a determination that the contesting party had a subjective belief in the merits of the contest or attack on the instrument.[28] A handful of states permit the enforcement of no-contest clauses without regard to either the good faith requirement or the probable cause exception.[29] Currently, only Indiana and Florida expressly prohibit the enforcement of no-contest clauses, and Vermont is the only state that does not address the enforcement of no-contest clauses in either its statutory or case law.[30]

Enforcing and Litigating No-Contest Clauses

Both clients' requests to incorporate no-contest clauses into their estate plans and the enforcement of no-contest clauses are on the rise. Assuming that the laws of a jurisdiction permit enforcing these clauses in the first place, lawyers must determine and advise their clients on how the clause will be enforced. This depends on whether there has been a contest and, if so, whether the contesting party falls within the purview of the clause.

Is There a "Contest"?

Courts have traditionally construed no-contest clauses strictly because of the public policy disfavoring forfeitures.[31] Further, as stated in the *Restatement (Third) of Trusts*, a no-contest clause "shall not be enforced to the extent that doing so would interfere with the enforcement of proper administration of the trust."[32] However, it is clear that these clauses are enforceable.

What is not always clear is whether a contest constitutes an attack sufficient to trigger the no-contest clause. *Black's Law Dictionary* defines a "will contest" as "[a]ny kind of litigated controversy concerning the eligibility of an instrument to probate."[33] The *Restatement (Second) of Property* provides that a no-contest clause is normally intended to apply to "any attack upon the will . . . which is designed to invalidate the document," and the term "attack" means "an attempt to procure a judicial decision holding invalid some provision of the will."[34] Commencing an action to contest all or a part of a dispositive instrument "should normally be construed to be a violation of the restraint" and, in the absence of specific contrary language, "the restraint should be construed to be violated regardless of whether the action to contest the dispositive document or to attack a particular provision thereof is subsequently withdrawn either immediately after its commencement, prior to a hearing, at the trial, or at any time thereafter."[35] The *Restatement* comments, however, are stricter than what typically occurs in practice. For example, where beneficiaries engage in a series of smaller actions that could be considered an attack in the aggregate, such conduct may trigger the no-contest clause. In addition, as evidenced by the cases discussed herein, no-contest clauses have also been enforced against beneficiaries whose challenges do not go directly to the validity or enforceability of the dispositive instrument.

Under Colorado law, a party contesting a dispositive instrument states his written objections in the pleadings.[36] Therefore, a stated contest of or objection to the validity or enforceability of a dispositive instrument or provision likely constitutes an attack sufficient to trigger a no-contest clause. However, indirect actions, such as the attempt to admit a subsequent will, as seen in *Peppler*, can also be considered an attack sufficient to trigger the no-contest clause if the language of the particular clause allows it.[37]

Strictly construing the language of no-contest clauses, other courts have found that the following actions generally do not constitute an attack: asserting one's statutory rights to inherited property,[38] seeking clarity regarding a fiduciary's duties and authorities,[39] seeking instruction regarding the construction of dispositive terms,[40] and filing an action against a trustee for breach of fiduciary duties.[41] Ultimately, whether the action constitutes an attack will depend on the language of the clause and who raises the action.

Who Is the Clause Enforceable Against?

When a "contest" is sufficient enough to trigger the no-contest clause, it becomes necessary to determine whether the no-contest clause applies to the contesting party. This determination depends primarily on how broadly or narrowly the clause is drafted; if the clause is drafted so narrowly as to limit its applicability to a certain class of beneficiaries or circumstances, enforcement is likely to be limited to that specific class or the particular triggering circumstances.[42] For example, the following narrowly drafted no-contest clause appeared in the Texas case *Marion v. Davis*: "In the event that any of the beneficiaries or devisees to my Will should attempt to place my wife in a nursing facility and defeat my plan . . . his or her share of my estate and trust remainder shall be forfeited. . . ."[43] The court enforced this clause when a beneficiary, who was also the guardian of the testator's wife, placed the testator's wife in a nursing home and rejected the beneficiary's defenses that necessity should override the testator's wishes and that the good faith and probable cause defenses should apply.[44]

On the other hand, as in *Peppler*, if the clause is drafted so broadly as to apply to *any* beneficiary or fiduciary who raises *any* question as to the dispositive instrument or provision, enforcement is more likely to apply broadly.[45] This is consistent with the general rule that the terms of the governing instrument control the interpretation, enforcement, and administration of the instrument and the resulting estate.[46] To determine the scope of how a no-contest clause is likely to be enforced, it is therefore necessary to look at the clause itself, how broadly or narrowly it is drafted, and what the testator or settlor intended when the clause was initially drafted. The following section provides guidance to the drafting attorney, who should work closely with the client to incorporate a clause that meets the client's goals.

Drafting Considerations

Clients wishing to include no-contest provisions in their estate planning documents should be advised that the clauses are enforceable (subject to the exceptions) in most states, including Colorado,

and that they are likely to be enforced consistent with the scope of the clause as drafted.

Clauses should be drafted narrowly or broadly, in accordance with the client's objectives, keeping in mind that courts construe no-contest clauses strictly. For example, a Georgia appellate court strictly construed a narrowly drafted no-contest clause that expressly prohibited "a legal or equitable challenge" by the testator's four children to the trustee's administrative, management, and distribution decisions *only*, and provided that the challenging child(ren) would forfeit any interest under the trust if such challenge was unsuccessful.[47] Three of the testator's children filed actions alleging that the trustee had a conflict of interest, that the settlor lacked mental capacity, and that the settlor had been the victim of undue influence. The court determined that the language of the no-contest clause was limited, that it did not apply to these types of actions, and that the children did not forfeit their interests.[48] *Marion* provides another example of a narrowly drafted and narrowly enforced no-contest clause.[49]

Conversely, courts will enforce broadly drafted clauses to the extent permitted by the clause. An example of a broadly drafted no-contest clause for a trust agreement intended to be broadly applicable to a trust contest is:

> If any person shall, in any manner, directly or indirectly, attempt to contest or oppose the validity of this dispositive instrument (including any amendment thereto), or commences, continues, or prosecutes any legal proceeding to set this instrument aside, then such person shall forfeit his or her share, cease to have any right or interest in the trust property, and shall, for purposes of this instrument, be deemed to have predeceased me.

Because it is drafted broadly (as was the clause in *Peppler*) and is intended to apply to direct or indirect challenges, this clause would likely be enforced against many types of contests by a wide variety of potential contesting parties.

Practically speaking, it is also important to consider that the no-contest clause will only apply to and be enforceable against a party who stands to receive a gift under the dispositive instrument in the first place. Some drafting attorneys recommended that the client include a statement that a potentially contesting party will receive "nothing." While such statement sends a message to the disinherited party, it is unlikely to dissuade the party from contesting the plan; leaving nothing to a potential contestant may cause the disinherited party to be *more* likely to contest the instrument out of spite and *less* inclined to be threatened by the no-contest clause. Rather, the threat of a no-contest clause is more impactful where the risk of forfeiting a gift is significant. Attorneys should also consider drafting the clause broadly enough to dissuade a surrogate (e.g., a disinherited heir) from being recruited to file a contest proceeding.

Because no-contest clauses have traditionally been construed strictly, a drafting attorney is wise to work closely with the client to draft the clause so it will apply only as the client intends. Thus the drafting attorney should be careful with using boilerplate language for no-contest clauses, and in providing too large or too small of a devise to a potentially contesting party, to avoid a situation in which the clause is enforced in unintended circumstances or against unintended parties.[50]

In the authors' experience, courts may be enforcing no-contest clauses more frequently, and it will be increasingly important for the drafting attorney to also discuss with clients the potentially adverse consequences of these clauses.

Litigation Risks and Precautions

While the drafting attorney can clarify the scope of the no-contest clause from the outset, the litigator representing the contesting party can similarly take steps to reduce the risk that a no-contest clause will be enforced and take action to reduce the risks to the lawyer in taking on this type of case.

As previously explained, nearly all states permitting the enforcement of a no-contest clause also carve out an exception to its enforcement if the contesting party had probable cause to initiate the contest. Additionally, as the court stated in *Peppler*, probable cause for purposes of a challenge to a dispositive instrument is defined as the "existence, *at the time of the initiation of the proceeding*, of evidence which would lead a reasonable person, properly informed and advised, to conclude there is a substantial likelihood that the contest or attack will be successful."[51]

One factor the *Peppler* Court considered in determining whether the contesting party was "properly informed and advised" was whether the beneficiary sought the opinion of disinterested counsel in good faith and after full disclosure of the facts.[52] Neither *Peppler* nor the *Restatement* defines "disinterested counsel." However, Colorado commentators have suggested that "disinterested counsel" does not include the contesting party's counsel for the will contest because, if the advice of such counsel were sufficient, this factor would be essentially meaningless as nearly every litigant bringing a contest would be able to meet it.[53] Therefore,

the beneficiary may wish to seek input from an attorney who is not litigating the case to get an impartial assessment of whether there is sufficient probable cause for the action to not trigger the no-contest clause.

An attorney who is advising clients about the possibility of challenging a will or trust containing a no-contest clause must also carefully consider the potential risks if a no-contest clause is enforced against their client. The rising popularity of these clauses increases the risks that attorneys without sophisticated knowledge of their implications may ill-advisedly encourage litigation. Beneficiaries disappointed by the loss of the underlying will or trust contest, then further shocked by enforcement of a no-contest clause, may sue their attorneys for malpractice in failing properly to advise them.

Further, litigators advising contesting beneficiaries should carefully explain to clients their entitlement under the document containing the no-contest clause, their entitlement under any previous document(s), the costs and fees associated with the litigation, the possibility of the no-contest clause being enforced, and the likelihood of having to pay the other side's legal fees and costs in each possible outcome. While there may be a perception that no-contest clauses are rarely enforced, the authors have seen a clause enforced that resulted in a significant loss to the contesting beneficiaries, and in another case, a court ruled that the beneficiary's actions indirectly questioning provisions of a trust were within the scope of the no-contest clause.

In addition, litigators should document the investigations undertaken by the client, other parties, and the attorney's office prior to filing the challenge. These actions will be examined to determine whether probable cause existed at the time the action was filed. For example, if a personal representative refuses to provide information regarding the estate plan or medical records, this may impede the client's ability to determine the merits of a contest, but also supports an argument that such information is needed to conduct an appropriate assessment. The client and the client's agent's attempts to obtain information, and any refusals by the other side to share information, should be considered in a probable cause analysis. If new information comes to light during the case, it should be discussed with the client to determine whether to continue on with the contest to help avoid the enforcement of the no-contest clause. Then, based on new information, the contesting beneficiary may need to again consult disinterested counsel. Thus the attorney must evaluate the case carefully and frequently based on the specific facts and circumstances presented. New information may require that the attorney and the client reassess the case at intervals to determine whether there is probable cause to continue the contest.

Recent cases have identified how the increasing enforcement of no-contest clauses may also result in increasing risks of liability for the attorneys involved.[54] For example, the New Hampshire Supreme Court found that a challenge by a beneficiary against the actions of a trust investment advisor constituted an indirect attack against a trust that had been operating and deemed legally valid for over a decade. A no-contest clause was enforced against the challenging beneficiary, who forfeited not only her future interests in the trust, but also had to repay certain distributions that were previously made to her. Thus using a no-contest clause in a trust context can expose trust beneficiaries who sue to the potential risk of forfeiting their original trust interests.[55] The beneficiary later sued the attorneys who had represented her in the challenge against the investment advisor for malpractice.[56]

Conclusion

With trust and estate litigation on the rise, and the increasing ability to accomplish post-mortem changes to estate plans, estate planning clients may be more likely to request no-contest clauses in their wills and trusts. Historically, these clauses have been strictly construed. Accordingly, drafting attorneys should work closely with their clients to ensure that no-contest clauses are drafted precisely to meet clients' goals.

No-contest clauses are enforceable in nearly all jurisdictions, including Colorado. Enforcement almost always depends on striking a balance between upholding the estate planning client's right to impose conditions on bequests and the beneficiary's right to raise a valid claim. Therefore, most jurisdictions will not enforce a no-contest clause if the contesting party had probable cause when initiating the proceeding. A minority of jurisdictions further explicitly impose a subjective good faith requirement.

The attorney representing the contesting party should understand how probable cause is determined; suggest clients seek advice from disinterested counsel when necessary; and assess cases carefully and frequently, based on changing facts and circumstances. Litigating attorneys should consider recent holdings indicating that no-contest clauses may be broadly enforced and the malpractice risks in representing the contesting party.

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Notes

1. *See* Johnson, "There's a Will, But No Way—Whatever Happened to the Doctrine of Testamentary Freedom and What Can (Should) We Do to Restore It?" 4 *Est. Plan. & Cmty. Prop. L.J.* 105 (2011).

2. *See* Sitkoff, "Trusts and Estates: Implementing Freedom of Disposition," 58 *St. Louis U. L.J.* 643 (Mar. 2014).

3. Beyer et al., "The Fine Art of Intimidating Disgruntled Beneficiaries With In Terrorem Clauses," 51 *S.M.U. L.Rev.* 225 (Jan./Feb. 1998); Jack, "No-Contest or In Terrorem Clauses in Wills—Construction and Enforcement," 19 *SW L. J.* 722 (1965).

4. Swank, "No-Contest Clauses: Issues for Drafting and Litigating," 29 *The Colorado Lawyer* 57 (Dec. 2000).

5. *Id. See generally* Begleiter, "Anti-Contest Clauses: When You Care Enough to Send the Final Threat," 26 *Ariz. St. L.J.* 629 (Fall 1994).

6. The statutory or common law of every state, with the exception of Vermont, addresses the enforcement of no-contest clauses, subject to certain restrictions. *See also* Baker et al., "You Can Take it With You—Assuring Compliance with Decedent's Wishes in an Era of Litigation and Flexibility," Chart 1, 2016 ACTEC Annual Meeting, Las Vegas, Nevada.

7. CRS §§ 15-12-905 and 15-11-517; *In re Estate of Peppler*, 971 P.2d 694 (Colo.App. 1998); *In re Estate of Sanstead*, 2016 COA 49 (Apr. 7, 2016).

8. The definition of probable cause does not vary widely across the states. Generally, it can be defined as whether the contesting party, at the time he initiated the action and upon proper information and advice, had a reasonable belief that the claim would be successful.

9. *See, e.g.*, CRS § 15-12-905.

10. *See* Begleiter, *supra* note 5.

11. This includes both traditional post-mortem estate planning techniques as well as modern techniques such as disclaimers and decanting.

12. Other effective techniques include non-probate transfers that pass to the beneficiary automatically at death.
13. CRS § 15-12-905. *See also* CRS § 15-11-517 (an identical statutory section referring to "penalty clauses" in wills).
14. *In re Estate of Peppler*, 971 P.2d 694.
15. Ultimately, the decedent's daughter substituted herself for his granddaughter as the proponent of the 1992 will.
16. *Id.* at 696 (emphasis added).
17. *Id.*
18. *Id.* at 697 (citing to *Restatement (Second) of Property*, Don. Trans. § 9.1, cmt. j. (1981)) (emphasis added).
19. *Id.* at 696–97.
20. *Estate of Henry Peppler*, Boulder Cty. Dist. Ct., No. 94-PR-933, Div. 3.
21. *See id.* The no-contest clause was enforced against the decedent's daughter, resulting in a forfeiture of her share under the 1984 will, even though it was the decedent's granddaughter who, as the nominated personal representative, initially attempted to admit the 1992 will.
22. *In re Estate of Sanstead*, 2016 COA 49. The Colorado Supreme Court recently granted certiorari to address, among other things, issues relating to the no-contest clause, including (1) the application of a no-contest clause from a trust to an accompanying pour-over will and (2) whether the decedent's attempt to revoke her revocable trust constituted probable cause for the beneficiary to challenge the trust and the pour-over will (16 SC 386, Nov. 21, 2016).
23. *Id.* at ¶ 62 (citing *In re Estate of Peppler*, 971 P.2d at 697 and CRS § 15-12-905).
24. *Id.* Some states explicitly provide that no-contest clauses contained in trusts are enforceable, usually subject to the probable cause exception. *See* Baker et al., *supra* note 6. While Colorado statutory law does not expressly permit the enforcement of no-contest clauses in trusts, *Sanstead* arguably extends to trusts generally. However, because revocable trusts are generally equated with will substitutes, this conclusion is not foregone.
25. Chalis and Zaritsky, "State Laws: No-Contest Clauses," ACTEC (Mar. 24, 2012), www.actec.org/assets/1/6/State_Laws_No_Contest_Clauses_-_Chart.pdf. *See also* Baker et al., *supra* note 6.
26. *See* Uniform Probate Code §§ 2-517 and 3-905 (each providing that "A provision in a will purporting to penalize an interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting the proceedings."). *See also* Baker et al., *supra* note 6.
27. Baker et al., *supra* note 6. The Uniform Probate Code provides for the enforcement of no-contest clauses in wills, although the Uniform Trust Code does not.
28. *Id.*
29. *Id.*
30. Indiana and Florida are the only states that expressly prohibit the enforcement of no-contest clauses by statute. *See* Ind. Code. §§ 29-1-6-2 (applicable to wills) and 30-4-2.1-3 (applicable to trusts); Fla. Stat. §§ 732.517 (applicable to wills) and 736.1108(1) (applicable to trusts).
31. *In re Estate of Peppler*, 971 P.2d at 696 ("While no-contest clauses in wills are generally held to be valid and not violative of public policy, such clauses are to be strictly construed, and forfeiture is to be avoided if possible."). *See also Estate of Bergland*, 182 P. 277 (Cal. 1919); *Estate of Newbill*, 781 S.W.2d 727 (Tex.Ct.App. 1989); *In re Estate of Stralem*, 695 N.Y.S.2d 274, 276 (Sur.Ct. 1999) ("It is well-settled that no-contest provisions are not favored by New York courts and are strictly construed.").
32. *Restatement (Third) of Trusts* § 96(2) (2012).
33. *Black's Law Dictionary* 1773 (Revised 10th ed. 2014).
34. *Restatement (Second) of Property*, Don. Trans. §§ 9.1 cmt. c and cmt. d (1983) (cited approvingly by *In re Estate of Peppler*, 971 P.2d at 697).
35. *Id.* at cmt. e.
36. CRS § 15-12-404.
37. *In re Estate of Peppler*, 971 P.2d at 696 (finding the testator's use of the language "directly or indirectly initiates legal action" evidenced his intent to "broaden the applicability of the no-contest clause" to any party raising a direct or indirect challenge to the will). *See also Estate of Sanstead*, 2016 COA 49 at ¶ 63; *Seymour v. Biehslich*, 266 S.W.3d 722 (Ark. 2007) (similarly finding that offering a later will for probate can constitute the contest of an earlier will).
38. *In re Rettenmeyer's Estate*, 345 P.2d 872 (Okla. 1959) (*overruled on other grounds*). *See In re Bovaird's Estate*, 645 P.2d 500 (Okla. 1982); *Estate of Schreck*, 47 Cal.App.3d 693 (Cal.Ct.App. 1975) (holding that surviving wife did not forfeit her estate by claiming her interest as the surviving joint tenant or her statutory right to a portion of testator's exempt property). *See also Doelle v. Bradley*, 784 P.2d 1176 (Utah 1989) (finding the no-contest clause was not triggered by the decedent's daughter filing a creditor's claim against the estate where the daughter had an interest in the estate property).
39. *Di Portanova v. Monroe*, 229 S.W.3d 324 (Tex.App. 2006) (holding that a no-contest clause did not apply where guardian sought to clarify trustees' authority and not to modify, set aside, or nullify trust terms).
40. *Ruby v. Ruby*, 973 N.E.2d 361 (Ill.App.Ct. 2012) (holding that no-contest clause was not violated when beneficiaries brought action to construe trust provision and collect a gift under the trust).
41. *Commonwealth Bank & Trust Co. v. Young*, 361 S.W.3d 344 (Ky.Ct.App. 2012).
42. *See Callaway v. Willard*, 739 S.E.2d 533 (Ga.App. 2013).
43. *Marion v. Davis*, 106 S.W.3d 860, 863 (Tex.App. 2003).
44. *Id.* at 866–68 (finding that the good faith and probable cause defenses did not apply where the action was not to determine the testator's intention, but where the beneficiary's action directly contravened the "plain and unambiguous" language of the trust).
45. *See, e.g.*, *In re Estate of Peppler*, 971 P.2d at 695.
46. *See, e.g.*, *Denver Found. v. Wells Fargo Bank, N.A.*, 163 P.3d 1116, 1122 (Colo. 2007) (the objective in construing a trust or a will "is to determine the intent of the settlors") (citing *Meier v. Denver U.S. Nat'l Bank*, 431 P.2d 1019, 1021 (Colo. 1967) ("The cardinal rule in the construction of a Will is that the Court shall determine the actual intent of the testator from the instrument in its entirety and, having ascertained that intent, shall carry it out, provided that the testator's intent conforms to law and public policy.")).
47. *Callaway*, 739 S.E.2d 533.
48. *Id.*
49. *Marion*, 106 S.W.3d 860.
50. But drafting attorneys should avoid being too creative. In an Arizona case, the court held that a no-contest clause was enforceable subject to Arizona's statutory probable cause exception, regardless of an exception stated in the clause that forfeiture would occur "regardless of the beneficiary's good faith or ultimate success." *In re Estate of Stewart*, 286 P.3d 1089 (Ariz.Ct.App. 2012), as amended Sept. 28, 2012 and Oct. 11, 2012.
51. *In re Estate of Peppler*, 971 P.2d at 697 (citing to *Restatement (Second) of Property*, Don. Trans. § 9.1 (1981)) (emphasis added).
52. *Id.*
53. Swank, *supra* note 4 at 58 n. 9.
54. *Shelton v. Tamposi*, 62 A.3d 741 (N.H. 2013) (holding that a challenge between a trust investment advisor and a beneficiary constituted an indirect attack on the validity of the trust despite the fact the trust had been operating and deemed legally valid for over a decade); *In re Estate of Stewart*, 286 P.3d 1089; *In re Shaheen Trust*, 341 P.3d 1169, 1171 (Ariz.Ct.App. 2015) (addressing the applicability of the probable cause exception, holding that one of several actions regarding whether the trustee should be making distributions monthly or annually lacked probable cause, and enforcing the no-contest clause).
55. *Shelton,* 62 A.3d 741.
56. *Tamposi v. Denby*, 974 F.Supp.2d 51 (D.Mass. 2013) (finding allegations were sufficient to state a claim for malpractice). ■