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David A. Baker
McDermott Will & Emery LLP
Chicago, IL

S. Andrew Pharies
DLA Piper LLP (US)
San Diego, CA

I. Overview

Estate planning attorneys face high risk cases on a regular basis. In order to deal with those cases effectively, estate planning attorneys must reach outside of their regular form files and office procedures and adopt the mindset of a litigator in order to reverse engineer an estate plan that will carry out and protect, against all external influences, the client's testamentary desires. This task is much harder than it used to be, and it is much harder than many estate planning attorneys imagine. While post-death contests and disgruntled beneficiaries are age-old enemies of testamentary intent, new threats have arisen in recent decades in the form of sanctioned post-death modifications of testamentary documents. While giving lip service to carrying out the testamentary intent of a testator or trustor, courts and legislatures are rapidly devising new ways to frustrate that intent by giving the beneficiaries greater power to devise an estate plan that meets their, rather than the decedent's, objectives.

The purpose of this program is to arm the estate planning attorney with sufficient tools to carry out the testamentary desires of his or her client while mitigating the possibility of post-death frustration of those desires. It will discuss methods to mitigate the risk of a direct attack on estate plan documents. It will then discuss methods to mitigate the risk of an indirect attack on testamentary intent by a disgruntled beneficiary during the post-mortem administrative period.

II. Identifying High Risk Cases

High risk cases present themselves in many forms and are often not considered high risk by the client. Estate planning attorneys must identify high risk cases at the earliest stage possible in order to educate the client about the risks and to structure the engagement in a manner consistent with the additional work necessary to construct an estate plan that can withstand potential future challenges. High risk situations include, but are not limited to, the following:

- Disinherited family members;
- Unequal distributions among people of the same class;
- Multiple marriages and children from different spouses;
- Unequal participation in family businesses by children;
- Elderly or impaired client;
- Impaired beneficiaries;
- Presence of one beneficiary in the estate planning process to the exclusion of others; and
- Substantial deviations from prior estate plan documents

To protect the client's testamentary desires in a high-risk environment, estate planning attorney must take steps to mitigate the chances of a successful contest or other direct attack on the testamentary instruments and design the terms of the instruments to mitigate the chances of an indirect attack through litigation involving post-death administration.

III. Planning In Anticipation of a Contest

A. In general

In order to structure an estate plan to withstand a potential contest, the estate planning attorney must anticipate the nature of future challenges and create the evidence that will be used by the litigation attorney to defend against a contest.

B. Grounds for Contesting Testamentary Documents

1. Lack of Competency

As a general proposition, a court will declare a testamentary document invalid if it determines that the person who executed the document lacked the requisite level of competency at the time of execution.

a. Competency Standards Generally

When most practitioners consider competency, they consider testamentary competency, which is the standard of competency required to execute a will. However, with the proliferation of will substitutes, it is important for practitioners to understand the competency standard that will apply to each document executed by the client[1] and to gather and create evidence to support the position that the client had competency to execute all documents.

b. Competency Standard for Wills

Although states differ slightly in the competency standard required to execute a will, as a general proposition courts will find that a testator possesses testamentary competency if, at the time the will is executed, the testator is able to understand the following:

- The nature and extent of the testator's property;
- The natural objects of the testator's bounty;
- The disposition the testator desires to effect through the will; and
- That the document the testator is signing is a will intended to dispose of the testator's property at death.[2]

Testamentary competency is measured at the time the will is executed. As a result, even if the testator suffers from mental impairment, he or she may still possess testamentary competency if the will was executed during a moment of lucidity.[3]

c. Competency Standard for Trusts

The competency standard applicable to trusts is not as uniform as the standard for testamentary competency, and the standard differs depending on whether the trust serves as a substitute for a will or as the recipient of a lifetime gift.[4] Generally, trustors of revocable trusts need only possess testamentary competency. While some states require a trustor of an irrevocable trust with a retained life estate or retained income interest to possess only testamentary competency, most states require a trustor of an irrevocable trust to possess contractual competency, which is a higher standard.[5]

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[1] *See* Whitman, *Capacity for Lifetime and Estate Planning*, 117 Penn. Law. Rev. 1061 (2013) (providing a good discussion of the different competency standards that apply to different estate planning documents and transactions).
[2] Marty-Nelson, Gilmore, and Rodriguez-Dod, 824-3rd T.M., *Testamentary Capacity, Undue Influence and Validity of Will* at A-51.
[3] *See, e.g., Skelton v. Davis*, 133 So.2d 432 (1961).
[4] Whitman, *supra*, at 1072.
[5] Whitman, *supra*, at 1072-1073; *see also Anderson v. Hunt*, 196 Cal.App.4th 722 (2011) (suggesting that contractual competency, rather than testamentary competency, may be required even for revocable trusts with complicated dispositive provisions).

2. Undue Influence

Undue influence is the "excessive persuasion that causes another person to act or refrain from acting by overcoming that person's free will and results in inequity."[6] Generally, a finding of undue influence requires three elements to be satisfied: (1) influence was exerted on the person executing the document, (2) the effect of the influence was to destroy the free agency of the person executing the document, and (3) the product was a document that would not have been executed without the influence.[7] Since undue influence is normally done in the shadows, most states apply a presumption of undue influence to shift either the burden of proof or the burden of moving forward. To trigger the presumption, the contestant need only show that the proponent of the document (1) is a substantial beneficiary, (2) was in a confidential relationship with the person executing the document, and (3) was active in procuring the document.[8] Once that presumption applies, the burden shifts to the proponent of the document to prove that undue influence did not exist.

3. Fraud

Some courts view undue influence as a species of fraud,[9] but often exist separately. Fraud exists without undue influence when the person executing the document, although acting of his or her own volition, executes a document he or she would not have executed without being under the influence of fraudulent conduct of others, such as intentional misrepresentations made by a person who benefits under the document.[10]

4. Duress

Duress is related to undue influence in that the actions of a third party who intends to benefit from the person executing a document overwhelms such person's volition and causes him or her to execute a document he or she would not have executed but for the actions of the third party. Rather than ingratiating him or herself to the testator in order to procure the desired testamentary disposition, as a proponent would ordinarily do in a case of undue influence, duress exists when the proponent overwhelms the volition the person executing the document with threats made against such person.[11] For example, if a bad actor kidnapped a testator and the testator made a will benefiting the kidnapper under threat of physical harm to the testator's family, then the testator's family could set aside that will for being made under duress.

5. Mistake

Challenges to testamentary documents on the basis of mistake are usually framed as actions for reformation or rescission. Regardless of the manner in which the action is framed, the objective of the contestant is either to set aside the document in its entirety or to change its terms to benefit the interests of the contestant.[12] In the context of testamentary documents, mistake usually manifests itself in the form of a scrivener's error, that is, as a result of an error by the estate planning attorney, resulting in the testamentary document not properly expressing the testator's desire.[13] In such cases, courts will ordinarily reform the testamentary document to comport with the testator's desire. In egregious cases, however, when reformation is not appropriate, courts can rescind the document in its entirety based on mistake.[14]

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[6] Cal. Welf. & Inst. Code § 15610.70(a) (in accord with statutory and common law definitions in most states).
[7] *See, e.g., In re Estate of Carpenter*, 253 So.2d 697 (Fla. 1971).
[8] *See, e.g., In re Estate of Shumway*, 9 P.3d 1062, 1067 (Az., 2000).
[9] *See, e.g., Adams v. Adams*, 742 N.W.2d 399, 403 (Mich. Ct. App. 2007).
[10] *See, e.g., In re Newhall*, 190 Cal. 709 (1923).
[11] *See, e.g.*, Cal. Civ. Code § 1569; *Leeper v. Beltrami*, 53 Cal.2d 195 (1959).
[12] *See, e.g., Getty v. Getty*, 187 Cal.App.3d 1159 (1986).
[13] *Id.*
[14] *See, e.g., In re Dobyns Irrevocable Trust*, 205 Or.App. 183 (2006).

C. Creating the Record

With few exceptions, there is very little the estate planning attorney can do when drafting the estate planning documents to prevent a contest of the documents. Rather, planning in anticipation of a contest largely involves creating the evidentiary record that will be used by the litigation attorney to defend the integrity of the documents. In order to create this evidentiary record effectively, and to ensure that all important pieces of evidence created are later admissible in a contest action, the estate planning attorney should be familiar with the rules of evidence and create the evidentiary record in a manner consistent with those rules.

1. Contemporaneous Mental Competency Testing

Perhaps the most fundamental task of an estate planning attorney is to ensure that his or her client is mentally competent to execute the estate planning documents and to preserve evidence of such mental competency. It is important to establish and memorialize mental competency of the client regardless of whether the estate planning attorney feels comfortable that the client is competent. When the validity of the testamentary documents is at issue, the client will not be available to testify regarding his or her competency. In the absence of other evidence, the trier of fact may view the estate planning attorney's testimony regarding his or her client's competence as unreliable given the estate planning attorney's likely lack of familiarity with the client's medical records, the estate planning attorney's lack of training in mental competency issues, and the estate planning attorney's interest in protecting the integrity of his or her work product. Accordingly, in high-risk estate planning situations, it is rarely prudent to rely on the estate planning attorney's testimony as the only contemporaneous evidence establishing the client's competence.

a. Testing by a Mental Health Professional

The best evidence of a client's competence to execute estate planning documents is the testimony of a mental health professional who examined the client contemporaneously with the execution of the documents. While obtaining such an examination for every estate planning client is unrealistic, the estate planning attorney should considering obtaining such an examination in connection with high-risk cases. If the estate planning attorney decides to obtain an examination, he or she must consider what type of mental health professional is best suited to conduct the examination, what standards that person should use in conducting the test, and the form in which the test results should be reported. In order to enhance the probative value of any mental competency examination in later contest litigation, the estate planning attorney should consider using a psychiatrist or a neuropsychologist to conduct the evaluation. Both such professionals are trained to evaluate various cognitive functions and to identify cognitive deficits that may impair the client's competency.

In addition to the standard cognitive tests employed in such an examination, the estate planning attorney should cause the psychiatrist or neuropsychologist to test those cognitive functions that have been identified by state legislatures as relating to mental competency. An example of the cognitive deficits that may indicate a lack of competency is set forth in California Probate Code Section 811. That section lists a series on cognitive functions that must be examined in evaluating contractual competency. Those cognitive functions include alertness and attention; level of arousal; orientation to time, place, and situation; ability to concentrate; memory issues; ability to understand and communicate with others; recognition of objects; ability to reason; ability to use abstract concepts, and the like. All of these factors are likely to be tested by the psychiatrist or neuropsychologist, but it is helpful to provide them with a framework within which their test results can be presented so the results can easily be understood by the court.

The psychiatrist or neuropsychologist should be directed to prepare a report that includes not only his or her findings relating to the tests of cognitive functioning but also sets forth the competency standard applicable to the various documents to be signed by the client. It should also include the psychiatrist's or neuropsychologist's opinion regarding whether the client meets those standards of competency. In addition, the report should

specifically state that the psychiatrist or neuropsychologist has examined the client's medical records and discusses the impact any medications the client may be taking may have on the client's competency. The report should be addressed to the estate planning attorney, and appropriate HIPAA and confidentiality waivers should be executed by the client to allow both the testing professional to reveal medical information to the estate planning attorney and also to allow the estate planning attorney to circulate that information, as well as the report, to interested parties after the client's death.

b. Testing at the Time of Execution

In addition to obtaining a contemporaneous mental competency examination, it is important for the estate planning attorney to establish the client's mental competency on the day the estate planning documents are executed. The estate planning attorney should question the client in the presence of witnesses in order to establish the client's level of competence on the day of execution. Shortly after execution of the documents, the estate planning attorney should prepare a memorandum to the file to serve as a contemporaneous record of the questions the attorney asked, the client's responses, and why those questions and answers caused the estate planning attorney to formulate the opinion that the testator possessed competence to execute the estate plan documents.

2. Third Party Interview

The estate planning attorney must establish that the client is acting of his or her own volition in executing the estate planning documents and is not under undue influence, duress, a victim of fraud, or acting under a mistake. This is particularly true if a child or other person who stands to be a substantial beneficiary has been involved in the planning process.

The estate planning attorney's course of conduct throughout the planning process will provide evidence of the presence or absence of undue influence. Indeed, one of the elements necessary to trigger the presumption of undue influence is the active participation of a person in a confidential relationship with the client in procuring the testamentary documents. In order to mitigate the contestant's ability to prove the active participation of the proponent of the documents, the estate planning attorney should take steps to isolate any beneficiary who unduly benefits from documents. Such a beneficiary should not, for example, be present in any meetings discussing the structure of the estate plan, should not be a conduit for communication between the estate planning attorney and the client, and should not be present when the estate planning documents are signed.

In addition, it would be prudent for the client to engage an attorney not associated with the drafting attorney to perform an in-depth interview designed to establish the absence of undue influence, duress, fraud, or a mistake. This interview, and the results of it, should be memorialized in a report prepared by the interviewing attorney, and the interviewing attorney should be prepared to serve as a witness in a later contest proceeding.[15]

The independent attorney should question the client regarding facts relating to the elements of undue influence, fraud, duress, and mistakes. With respect to undue influence, California has adopted a statutory list of factors a court must consider when evaluating a case of undue influence, and that list provides a helpful guide to anybody conducting an undue influence interview. The list of factors is as follows: [16]

a. The vulnerability of the victim**.** Evidence of vulnerability may include, but is not limited to, incapacity, illness, disability, injury, age, education, impaired cognitive function, emotional distress, isolation, or dependency, and whether the influencer knew or should have known of the alleged victim's vulnerability.

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[15] Some states require such an interview and a certificate of independent review to validate gifts to certain parties, such as caregivers, who are in a confidential relationship with a testator or trustor. *See* Cal. Prob. Code § 21380; Nev. Rev. Stat. Chapter 155.

[16] Cal. Welf. & Inst. Code § 15610.70(a)(1) through (4).

b. The influencer's apparent authority. Evidence of apparent authority may include, but is not limited to, status as a fiduciary, family member, care provider, health care professional, legal professional, spiritual adviser, expert, or other qualification.

c. The actions or tactics used by the influencer. Evidence of actions or tactics used may include, but is not limited to, all of the following:

(1) Controlling necessaries of life, medication, the victim's interactions with others, access to information, or sleep.

(2) Use of affection, intimidation, or coercion.

(3) Initiation of changes in personal or property rights, use of haste or secrecy in effecting those changes, effecting changes at inappropriate times and places, and claims of expertise in effecting changes.

d. The equity of the result. Evidence of the equity of the result may include, but is not limited to, the economic consequences to the victim, any divergence from the victim's prior intent or course of conduct or dealing, the relationship of the value conveyed to the value of any services or consideration received, or the appropriateness of the change in light of the length and nature of the relationship.

3. Videotaping Execution

a. Overview

Most litigation videographers who make a living videotaping depositions are also equipped to videotape the execution of a will or a trust. Videotaping has become popular and, some might say, a panacea to practitioners, who believe that the in terrorem effect of showing a potential contestant a dramatic videotape demonstrating the testator's capacities and desires will obviate an upcoming will and trust contest. Unfortunately, videotape executions are not always admissible in evidence, and even when they are, they can often do as much harm as good in defending the decedent's wishes; therefore an overview of this tool in the context of fiduciary litigation and estate planning is worthwhile.

b. Admissibility

Before videotaping an execution conference, it is important to determine the testator's objectives: Is the purpose of the videotaped execution conference limited to discouraging a potential litigant from contesting the testator's will or trust? Or, will the videotape ultimately be offered as evidence in a legal proceeding? If so, what type of evidence will be important? Keep in mind, however, an executor or other will proponent may not be able to keep the videotape out of evidence once it is disclosed, even if it was prepared primarily for in terrorem reasons. Therefore, attention to evidentiary admission rules in the relevant jurisdiction is always prudent.

If the videotaped execution conference will ultimately be offered as evidence in a legal proceeding, an analysis of the evidentiary rules of the jurisdiction(s) governing the administration of the will and trust is critically important to ensure that this goal can be achieved. In general, a videotaped execution conference is hearsay and, thus, is only admissible into evidence if it falls under one of the exceptions to the hearsay rule or if it is being offered for a non-hearsay purpose. Two states—Indiana and Louisiana—have specifically addressed the admissibility of videotaped execution conferences by statute.[17] In both states, a videotaped execution conference is admissible as evidence of (1) the

[17] *See* Appendix B.

proper execution of a will, (2) the intentions of the testator, (3) the mental state or capacity of the testator, (4) the authenticity of a will, and (5) matters determined by the court to be relevant to the probate of a will.[18]

In other jurisdictions, admissibility is governed by the state's general hearsay rules. Most courts that have addressed the issue have admitted a videotaped execution conference as evidence of the testator's capacity or under the "state of mind" exception to the hearsay rule.[19]

In addition to overcoming the rules against hearsay, it is also important to consider the foundation evidence that will be needed at trial. Any videotaped execution conference that is undertaken for admission into evidence should be performed by a professional videographer. Upon completion of the execution conference, the videographer and the attorney should establish a well-documented chain of custody of the tape or disc produced by the videographer to foreclose any future doctoring or post-creation authenticity challenges. Generally, the tape or disc obtained from the videographer should be marked and sealed as an original and placed in some form of protected, documented custody. Typically, a lawyer who receives such a videotape should seal the videotape at the time of the execution, and place it in the lawyer's vault with an affidavit.[20]

Because the exceptions to the rules against hearsay are typically premised on the notion that particular forms of hearsay are nonetheless reliable, taking measures to improve the reliability of the videotape and to protect against modification or tampering may be persuasive to a judge who is considering whether to admit the videotape into evidence, particularly in a jurisdiction that lacks a statute or precedent specifically addressing the admissibility of this type of evidence.

c. Presentation

Regardless of whether the videotape will be used for in terrorem or evidentiary purposes, the attorney should take steps to ensure an orderly and straightforward presentation. The three most important rules are: (1) the testator should look good on tape; (2) the testator should understand the documents; and (3) the taping should be rehearsed. Most often, attorneys consider videotaping an execution conference when a testator is elderly or impaired and capacity may be an issue in anticipated litigation. These presentations often reveal a badly impaired testator, which may do as much harm as good, particularly with juries, who don't always understand the extreme deterioration required in order to lack testamentary capacity. If the future decedent will have trouble signing a document or expressing an understanding of the documents, videotaping should probably be avoided.

The setting of the execution conference is also important. To the extent possible, will or trust execution conferences should be videotaped in the lawyer's office, not in the testator's home or in a hospital. The only people present should be the videographer, the testator, the supervising attorney, and any required witnesses. Anybody who might be charged with undue influence should not be present, including the testator's spouse. The execution conference should be plainly visible, which may require the videographer to move the camera so that the actual gliding of the pen across the paper can be seen on the videotape.

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[18] *See* Ind. Code Ann. § 29-1-5-3.2; La. Code Civ. Proc. Ann. art. 2904 (as a condition to admissibility, Louisiana requires the testator to be sworn on the videotape).

[19] *See Estate of Burack*, 201 A.D.2d 561, 607 N.Y.S.2d 711 (1994) (admission of videotaped execution conference into evidence was not an abuse of discretion where the videotaped was not offered to probate the will, but was instead offered as evidence of decedent's testamentary capacity); *In re Estate of Clinger*, 292 Neb. 237 (2015) (trial court did not err in ruling that statements made by the testatrix during a videotaped execution conference regarding her intentions for the disposition of her property were admissible as evidence under the "state of mind" exception to the hearsay rule and instructing the jury to disregard testator's attorney's questions regarding influence).

[20] A form affidavit is attached as Appendix A.

The presentation should be both formal and scripted. The attorney should thoroughly prepare the testator before filming starts, so that questions will not be asked on the tape, which suggest confusion or indecision on the part of the testator. A common mistake is to discuss the reasons for testation decisions during the execution conference. Even if the testator can follow script and give a coherent explanation for the choices, these explanations often lead to mistake-of-fact litigation, where the parties litigate whether or not the reasons given on tape were well grounded. Since virtually no jurisdiction requires justification for testation choices, there is no real benefit to having the testator go on the record in a videotape execution conference regarding the reasons for his or her decisions.[21]

At the beginning of the tape, the attorney supervising the execution conference should announce the date, time and setting (in Louisiana, the testator should be sworn by an individual authorized to administer oaths). The attorney should then spell out the dispositive and fiduciary provisions of the documents. The testator should then acknowledge that he or she is familiar with these provisions, that his or her attorney has fully explained them to him or her and that they are in fact the provisions he or she desires. If the testator is blind or visually impaired, and cannot truthfully state that he has read or made himself or herself familiar with the provisions, the document, or at least the important dispositive and fiduciary provisions, the attorney should read the document out loud on the tape, even though this may result in a lengthy execution conference. Finally, no party should enter or leave the room during the taping or enter or leave the camera's field of view (unless the videographer must change the field of view in order to record the testator's and witnesses' actual signature).

d. 50 State Survey

The chart attached as Appendix B identifies the states that have expressly addressed the admissibility of videotaped execution conferences and states that have admitted such tapes as evidence under state evidentiary and hearsay rules.

D. In Terrorem Clauses

1. Overview

Formbooks and conventional drafting techniques for decedent's wills and trusts did not, until very recently, expressly address extraordinary provisions or measures designed to defeat attempts to change the plan or frustrate the decedent's wishes. In terrorem clauses, or so called "no contest" clauses, were, until very recently, the only tool available to discourage such conduct, and, again until recently, were only occasionally and marginally enforced.

2. Sample Clause

The following sample in terrorem clause is designed to address current trends in enforcement and plaintiffs' attempts to circumvent enforcement, as explained in the subsections that follow.

[21] *See, e.g.*, *Logsdon v. Logsdon*, 412 Ill. 19, 27 (1952) ("The testator has the unquestioned right to dispose of his property as he thinks best, and the fact that it is divided unequally between those who have claims on his bounty does not necessarily impair the validity of the will.").

a. **<u>In Terrorem Clause</u>.** To the maximum extent state law permits, if any person should take any one or more of the actions described in this paragraph, either directly or indirectly, then thereafter for all purposes the provisions of this instrument shall be construed and the property hereunder shall be disposed of as though such person had predeceased me, or predeceased the date of this instrument if a Trust, effective as of the date such action is taken. This paragraph shall take effect if any person identified in the preceding sentence:

(1) Contests my will or any codicil thereto, any exercise of a power of appointment by me, either during life or at death, or any transfer of property by me to any person during my life or from any person to a trust identified in subparagraph (b) below;

(2) Contests my revocable trust or any other trust created by me either during life or at death and whether by way of grant, exercise of power of appointment or otherwise, or any amendment to any of the foregoing;

(3) Contests any discretionary action taken by the Executor or Trustee or any adviser or protector acting hereunder, including but not limited to the allocation, funding or distribution of the Trust or Estate property, sale or other disposition of any Trust or Estate property, retention of any Trust or Estate property for any length of time, or allocation, charges or payment of expenses to or from any Trust or Estate property.

(4) Seeks to obtain a declaratory judgment regarding whether any action otherwise described or potentially described in this article violates the proscriptions of this article;

(5) Brings any action in tort against my spouse, any of my descendants, any beneficiary under this document or any fiduciary (including, but not limited to the directors, officers, committee members or employees of any fiduciary, individually or in their official capacity) with any authority over any part of my estate or a trust identified in subparagraph (b) above, or against any beneficiary of my estate or a trust identified in subparagraph (b) above, which claims damages or other recovery, including but not limited to the imposition of a constructive trust over any of that person's property or property held in trust for the benefit of said person, alleging or asserting that said person in any way caused or is responsible for the procurement of my will or a trust identified in subparagraph (b) above, or in any other way caused the person bringing said tort or related claim to receive less property or value from my estate or a trust identified in subparagraph (b) above than said person bringing the claim or filing the lawsuit otherwise would have received;

(6) Seeks to obtain an adjudication in any court with respect to my testamentary capacity, capacity to enter into binding contracts or mental capacity in general at any time;

(7) Cooperates or aids in any action described in the preceding provisions of this paragraph with any other person, regardless of whether that other person is himself or herself subject to this paragraph;

(8) For all purposes of this paragraph, a person who takes any action described in this paragraph, or a person takes any steps or measures designed to accomplish any of said actions, whether alone or in conjunction with others, shall be deemed to have taken said action described in this paragraph;

(9) The Executor or the Trustee, as the case may be, shall defend any action described in this paragraph, shall retain counsel to do so, and shall pay for said

defense, including legal fees and costs, from the property of the Estate and Trust, regardless of whether the action is a contest of the validity of my Will or a Trust under administration which is the source of said funds, and regardless of whether the defendant in said action is the fiduciary or other person with a duty to defend said Will or Trust. Any person taking any said action shall be disqualified, regardless of his or her status, from objecting to said defense, the payment of fees and expenses, or the selection of counsel;

(10) If any part of all of this paragraph is declared void, invalid, partially invalid, ineffective or is not enforced, for any reason, then the Executor or the Trustee described in subparagraph (i) above shall allocate all fees and costs of defending any action described in this paragraph first against any share or property otherwise distributable to any person taking said action, until said share or property is exhausted.

3. Standards for Enforcement

Virtually all jurisdictions have addressed the enforceability of in terrorem clauses either by statute or by case law. Only one jurisdiction—Vermont—does not appear to have any statutory or common law addressing enforcement, and only two states—Indiana and Florida—expressly prohibit the enforcement of in terrorem clauses by statute. The extent to which the remaining jurisdictions will enforce an in terrorem clause in a validly executed will or trust is still a mixed proposition; however, from jurisdiction to jurisdiction, certain trends are now evident, which are discussed below and summarized in the chart attached as Appendix C.

a. Probable Cause to Enforce

The vast majority of the states will not enforce an in terrorem clause unless the beneficiary had "probable cause" to initiate the proceeding. Probable cause is an objective standard, generally described as 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. This standard is generally measured at the time the challenge is filed.

In addition to objective probable cause, a minority of states graft a subjective element on to the standard for enforcement, or more aptly described, "good faith" additional requirement for enforcement. "Good faith" essentially requires a subjective belief in the *bona fides* of the claim, also measured at the time the claim is instituted, coupled with an objective probable cause standard. A small number of states sanction enforcement only on the good faith or subjective probable cause standard.

(1) Probable Cause Defined

There are a number of cases interpreting probable cause limitations on in terrorem clause enforcement, particularly with respect to contests based on undue influence.[22] Generally, the determination of whether a plaintiff had probable cause to file a contest is a matter of law, determined by the trial court, without an evidentiary hearing. Thus, on appeal, the trial court's ruling on probable cause is subject to de novo review.[23]

Since the definition of objective probable cause does not vary widely among the states, it should be relatively straight forward for defense counsel to mount a challenge to an objective probable cause assertion in a groundless contest involving a beneficiary trying to invoke forced heirship by challenging a document simply due to the lack of equality. Notably, the contestant must have

[22] *See* Appendix C.
[23] *See, e.g., In re Shaheen Trust*, 341 P.3d 1169, 1171 (Ariz. Ct. App. 2015).

probable cause for each and every separate claim he or she makes. For example, in *Shaheen*, the Arizona Court of Appeals, addressing the applicability of its probable cause defense to trusts, interpreted the probable cause standard as one needing to be satisfied for each separate claim made by a contestant. There were several different claims in the *Shaheen* case, and because only one of them, a relatively pedestrian dispute about whether the trustee should be making distributions monthly or annually, lacked probable cause, the beneficiary was disqualified from her entire interest in the trust.

Contestants who file actions based on undue influence are particularly vulnerable when attempting to show probable cause. Very few contestants actually understand undue influence: it requires a form of brainwashing so that no free will exists at the time of execution of the contested document.[24] The typical undue influence complaint, however, alleges bad or unfair choices brought about by some combination of the alleged wrongdoer's nagging, false pretenses, or simply overbearing conduct that causes the testator to placate the alleged wrongdoer. None of these behaviors are actually undue influence; generally issues of fairness, reasonableness or justification for the choices made by a testator, as long as they are actually choices, are not dispositive and often kept from a jury, due to the pattern jury instructions in many states.[25] Therefore, where evidence does not support the existence of some sort of overwhelming behavior and an overwhelming impact on a testator, probable cause may be successfully challenged.

(2) Drafting Around Probable Cause

At least one court has rejected an attempt to draft around a statutory probable cause exception to enforcement of an in terrorem clause.[26] In *In re Estate of Stewart*, the trial court had initially invalidated an in terrorem clause in the Decedent's trust because the clause stated that it should be enforced notwithstanding probable cause, but the trust was being administered in Arizona, which has a statutory probable cause exception to enforcement of in terrorem clauses. The Arizona Court of Appeals reversed the invalidation and essentially directed that the court would enforce the in terrorem clause subject to the state's statutory probable cause exception, regardless of the override in the clause.

The *Stewart* decision is also interesting because, in subsequent hearings in the Arizona Court of Appeals, the aiding and abetting language in the in terrorem clause was challenged as a public policy affront, given its alleged chilling effect on witnesses. The court ruled that voluntary cooperation by a witness who also is a beneficiary would violate an aiding and abetting clause, while involuntary cooperation, such as testifying at a deposition or a trial, would not.[27]

(3) Denying Probable Cause at the Commencement of Administration

If the practitioner has taken the steps to create the evidence supporting the validity of the testamentary instrument, it may be possible for the attorney representing the post-death fiduciary to deny a potential contestant probable cause by providing the potential contestant with a copy of the mental competency report and third-party interview report at the outset of the administration. Also, providing the reports could deter a potential contestant from commencing a contest action since counsel for the potential contestant

[24] *In re Estate of Hoover*, 155 Ill. 2d 402, 411, 615 N.E.2d 736, 740 (1993).
[25] *See, e.g.*, Illinois Pattern Jury Instructions, Civil, No. 200.07.
[26] *In re Estate of Stewart*, 286 P.3d 1089 (Ariz. Ct. App. 2012), as amended (Sept. 28, 2012), as amended (Oct. 11, 2012), as amended on reconsideration (Nov. 21, 2012).
[27] *Id.* at 1094.

would understand the difficulty he or she would have in overcoming the contemporaneous evidence supporting the validity of the instrument.

If the practitioner envisions providing potential contestants with the reports, he or she must take the appropriate steps to secure the client's waiver of privacy rights under HIPPA, applicable privileges, and duties of confidentiality.

4. Scope of In Terrorem Clauses

Perhaps the most troubling aspect of in terrorem clause enforcement for a estate planning attorney is describing the scope of the clause in a way that will provide for maximum enforcement of the clause against potential challenges. This difficulty arises both because the plaintiffs' bar has successfully engineered around the typical no contest clause by framing litigation in a manner other than traditional will and trust contests; and because of the edict from the courts to narrowly construe in terrorem clauses because of the public policy against forfeiture. Examples of the types of litigation which are used to circumvent in terrorem clauses are the tort of intentional interference with testamentary expectancy; challenges to administration, including actions over failed or allegedly improper investments; and construction or interpretation of alleged ambiguities.

a. Tortious Interference With an Expectancy of Inheritance

Of all these creative captioning exercises, perhaps the most perplexing is the intentional tort. Now recognized in approximately half the country, and only repudiated in seven states, this cause of action targets the individual alleged to have interfered with somebody's right of testation and grants personal relief in the form of a judgment against that individual, rather than simply re-carving the estate or trust pie. While many states, like Illinois and California, expressly condition the availability of the tort on the ability to set aside the testamentary documents at issue, not all states follow this rule.[28] As a consequence, plaintiffs can often side-step the direct contest of a will or trust and sue the alleged wrong-doer, who may in many circumstances be the individual who benefits most from the attacked estate plan, or the person who would also bear the most risk from a direct contest. In other words, somebody with forfeiture at stake attacking a will or trust could choose to instead attack the primary beneficiary taking under the will or trust, or the fiduciary, and claim that such a challenge does not violate an in terrorem clause, even one that contains a so-called "indirect" attack prohibition, or an aiding and abetting clause.

(1) Interplay of Intentional Tort With In Terrorem Clause Enforcement

Most courts still maintain that in terrorem clauses should be narrowly construed. Therefore, it is critical that a broadly drafted in terrorem clause expressly include the intentional tort and any other cause of action that targets an individual for tort or other financial relief that includes as an element a claim that a will, trust or other testamentary transfer has somehow been procured through tortious misconduct.

b. Challenges to Fiduciary Conduct

Another strategy used by plaintiffs to circumvent in terrorem clauses is to challenge fiduciary conduct, such as implementing investment policy or allocating expenses and charges in computing distributions, rather than a direct attack on the validity of the will or trust. At least one court has rejected such an attack.[29] In *Shelton v. Tamposi*, the in terrorem clause was a relatively standard, somewhat old and conventionally drafted provision that on its face appeared to apply primarily to direct attacks brought to the

[28] *See, e.g., Robinson v. First State Bank of Monticello*, 97 Ill. 2d 174, 185, 454 N.E.2d 288, 294 (1983); *Beckwith v. Dahl*, 141 Cal. Rptr. 3d 142, 153 (Cal. Ct. App. 2012); *see also* Appendix C.
[29] *Shelton v. Tamposi*, 62 A.3d 741 (N.H. 2013).

validity of the will or trust at the time of their admission to probate or establishment upon death. The *Tamposi* challenge occurred many years later, after the trust had been operating and was legally deemed valid for over a decade. The challenge involved a clash between the investment adviser and one of the beneficiaries, over the ability to control investments and therefore liquidity. The court, recognizing that a successful challenge would likely cause the liquidation and distribution of the entire share out of trust to the beneficiary, deemed the challenge to be an indirect attack on the validity of the trust, effectively an attempt to break the trust, and therefore defaulted the beneficiary, who had been receiving funds from the trust for many years.

In many cases, however, courts are not as willing to look beyond the formal, legal theory underlying the cause of action, and many states expressly exempt challenges to any type of fiduciary conduct from the scope of in terrorem enforcement for policy reasons. A broadly drafted in terrorem clause, that expressly includes all this activity, should be effective to bring challenges to fiduciary conduct within the scope of in terrorem clause, unless the court maintains for policy reasons, that the clause is being used to cloak fiduciary misconduct. One way to address this issue is to draft a clause that states that any action against a fiduciary which could have the effect of materially altering the disposition of property under the will or trust, or effectively terminate the trust, should be deemed a direct attack on the will or trust and not an attempt to enforce the integrity of fiduciary conduct.

c. Judicial Construction Actions

Another cause of action which is often used to circumvent in terrorem clause enforcement is judicial construction to interpret alleged ambiguities, scrivener's errors or other mistakes in wills and trusts. While there are generally jurisdictional barriers to bringing these cases, and the grounds typically do not include simple dissatisfaction with the terms of the estate plan, it is not difficult to conjure up an alleged ambiguity in any document, and courts are not always exacting about determining whether a *bona fide* ambiguity exists before allowing a construction suit to go forward.

Claiming that a term in a will or trust is ambiguous and therefore needs to be construed in a manner that has the same impact on the plaintiff as a successful challenge, is often a means of circumventing in terrorem enforcement, particularly in states where the courts have said that barring people from recourse for construction violates public policy. A broadly drafted in terrorem clause, which expressly includes the use of a construction or reformation proceeding to materially alter a beneficiary's interest without probable cause, is probably the best way to contain this type of challenge.

5. 50 State Survey

A survey of the reported decisions over the last ten years in this area, including the *Stewart*, *Shaheen* and *Tamposi* opinions discussed *supra*, reveals a judicial trend toward enforcing in terrorem clauses. In fact, it is difficult to find a reported decision handed down in the last 10 years which expressly refuses to enforce an in terrorem clause on some basis other than good faith, probable cause or an action outside of the express terms of the clause.

Moreover, there has been some departure from the traditional "narrow construction" of in terrorem clauses. Although courts still generally give lip service to the need to narrowly construe in terrorem clauses due to public policy concerns, an increasing number of opinions and outcomes from those cases belie the notion that courts are narrowly construing these clauses. Included in the more expansive enforcement holdings in recent cases are: broad interpretation of aiding and abetting language in an in terrorem clause to include proxy contests and indirect challenges; application of in terrorem clauses in litigation beyond traditional will and trust contests, such as challenging asset transfers, setting aside joint tenancies, defending claims, attacking fiduciary conduct and investment related challenges; and, perhaps most significantly, application of in terrorem clauses in circumstances where the express language of the clause appears to apply only to formal will and trust contests, but the clause is being invoked to disinherit where the party

making the claim does not actually directly contest the will or trust. Two decades ago, many of these opinions would have seemed unlikely and suggest that courts are increasingly willing to enforce an in terrorem clause as a means of ensuring that the testator's intent is followed.

While beyond the scope of this topic, it is important to note that an attorney representing a potential contestant with an interest under the will or trust at issue, must carefully consider the malpractice exposure of advising the potential contestant/litigant about the risk of forfeiture.

A survey of state law on *in terrorem* clauses is attached as Appendix C.

E. Pre-Mortem Validation of Testamentary Instruments

The most significant challenge in defending against a will or trust contest is the unavailability of the testator to testify regarding the validity of the instrument. This unavailability necessarily causes most contest proceedings to be determined by circumstantial evidence and hearsay testimony of witnesses who have a financial stake in the outcome of the proceeding. In some jurisdictions, the estate planning attorney can prevent the problems caused by the unavailability of the testator by instituting a pre-mortem validation procedure to determine the validity of the testamentary instrument while the testator is living.

Eight states allow pre-mortem validation of a will by statute.[30] Additionally, California seems to allow pre-mortem validation of a will if done in the context of a conservatorship proceeding.[31] In each of these states, the pre-mortem validation requires the testator (or the testator's conservator) to commence a proceeding in court for an order validating the will. Notice of the proceeding must be given to all beneficiaries and heirs, and any potential contestant must appear in that proceeding and contest the will to avoid being collaterally estopped from doing so after the testator's death.

Alaska,[32] Delaware,[33] New Hampshire,[34] and Nevada[35] allow for a pre-mortem validation of revocable and irrevocable trusts. While not expressly authorized by statute, other states allow proceedings concerning the construction and validity of trusts that might be used for pre-mortem validation.[36] Most of these states require a court proceeding to validate the trust instrument. In Delaware, however, pre-mortem validation of a trust can be accomplished with a notice to the potential contestant.[37] If a potential contestant fails to contest the trust within 120 days of receiving the notice, he or she is barred from doing so in the future.

Pre-mortem validation procedures have several benefits and, if available, should be considered by any estate planning attorney facing a potential contest. The most significant benefit is that the client is available to testify regarding his or her competence, lack of undue influence, and the reasons for the high-risk estate plan. If the client would make a good witness, the availability of the client could provide an almost insurmountable advantage to the proponent of the estate plan. Additionally, when the estate plan does not involve a complete disinheritance, an adversely effected beneficiary may be reluctant to contest the estate plan out of fear that his or her inheritance would be further reduced by confronting the testator.

Before instituting a pre-mortem validation procedure, the estate planning attorney must consider the potential burdens of doing so. Primary among those burdens is the potential impact on his or her client. Most clients are reluctant to initiate a pre-mortem validation procedure because the procedure could potentially lay bare the most private aspects of the client's life – his or her estate plan, medical issues, financial affairs, and familial relationships. The pre-mortem validation procedure results in contest litigation, the client will be faced with spending years, perhaps the last years, of his or her life embroiled in

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[30] Alaska (AS § 13.12.530); Arkansas (A.C.A. § 28-40-201); Delaware (12 Del. C. § 1311); New Hampshire (N.H. Rev. Stat. § 552:18); Nevada (Nev. Rev. Stat. 30.040(2); North Carolina (N.C.G.S.A. § 28A-2B-1); North Dakota (N.D.C.C. § 30.1-08.1-01; Ohio (R.C. § 2107.081).
[31] *Murphy v. Murphy*, 164 Cal.App.4th 376 (2008).
[32] Alaska Stat. § 13.12.530.
[33] 12 Del. C. § 3546.
[34] N.H. Rev. Stat. § 564-B:4-406.
[35] Nev. R. Stat. § 30.040(2).
[36] *See, e.g.*, Cal. Prob. Code § 17200(b)(3).
[37] 12 Del. C. § 3546(a).

litigation involving his or her family and wealth. Also, if the pre-validation procedure results in the validation of a testamentary instrument, the client will be precluded from amending that instrument in the future without risking the loss of the protections afforded by the validation.

IV. Defending Against Intentional Interference with Testamentary Expectancy

Almost half of the states (twenty four) expressly recognize the tort of intentional interference with testamentary expectancy. Only seven states have expressly outlawed or refused to recognize the tort. Another twenty states are difficult to call, but it is a safe assumption that many of them would adopt the tort if faced with the proper pleading.[38] The tort has been used with increasing frequency to change testamentary outcomes. It is therefore important to understand the tort of intentional interference with testamentary expectancy and its impact on estate and trust litigation designed to defeat testator's wishes. It is also essential that the proponent of the estate plan understand the available defenses to the tort.

In essence, the difference between the intentional tort of interference with a testamentary expectancy and classic will and trust contest, is that the remedy is applied to the so-called tortfeasor, usually the person inflicting undue influence or obtaining allegedly invalid testamentary documents, rather than simply re-carving the testamentary pie and causing the estate or trust to be distributed in a fashion inconsistent with the challenged will or trust. Punitive damages are available in some jurisdictions. Therefore, the tort is often used in conjunction with or, in some cases independent of, traditional will and trust contests. The tort is typically used to put additional pressure on estate planning attorneys, who may be sued as alleged tortfeasors, and on executors or beneficiaries who might otherwise be able to defend a will or trust contest with estate assets, and therefore arguably could be placed at a disadvantage having to personally defend tort claims.

There are four elements to the tort: (1) a testamentary expectancy, which typically has to be more than just a belief or anecdotal comment that a testamentary disposition was considered or intended; (2) tortious interference with that expectancy by the defendant, generally described as some unlawful conduct which often includes undue influence; (3) a but/for causation that demonstrates that the testamentary expectancy would have passed to the plaintiff but/for the tortious interference; and (4) damages as a result of the diversion of the testamentary expectancy. 39

Two of the elements are most often the lynchpins and the Achilles heel of the cause of action. First, a testamentary expectancy has to be more than a subjective belief that the plaintiff would have received the testamentary interest at issue. Statements by testators and other "soft" evidence that something was expected are typically not enough.40 Typically, this requirement can only be satisfied by the existence of a prior, signed document, executed with legal formalities sufficient to allow it to be probated or administered under the law.

Second, the but/for causation test is perhaps the most critical aspect of defending against the tort. Many states define this but/for test as one that requires the invalidity of the testamentary document, in a separate proceeding, under all of the usual legal and factual standards, in order to claim that but/for the tortious interference the testamentary expectancy would have been received.41 This is most often expressed in the case law as requiring a tort filing within the limitations period for will or trust contests, coupled with a determination that the will or trust is invalid in order to obtain tort relief. In cases involving inter vivos transfers that defeat testamentary plans, this aspect would not be as significant.

There are many tactical reasons why the tort is often preferable for plaintiffs, most often because the standard for setting aside a testamentary document can be extremely difficult to meet. Strategically, the opportunity to place the alleged wrongdoer before a jury, without having to overcome all of the technical requirements to invalidate any will

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[38] *See* Appendix D.

[39] *Nemeth v. Banhalmi*, 425 N.E.2d 1187, 1191 (Ill. App. Ct. 1981).

[40] *See Firestone v. Galbreath*, 895 F. Supp. 917, 927 (S.D. Ohio 1995) ("Plaintiff must show something more than a mere expectancy in the estate or trust to establish a cause of action."); *Beren v. Ropfogel*, 24 F.3d 1226, 1230 (10th Cir. 1994) ("The jurisdictions that have recognized the intentional interference cause of action have done so in cases involving plaintiffs who had a tangible basis to assert a prospective inheritance, such as being an heir at law of the decedent or having been named in a prior will or testamentary instrument."); *Matter of Will of Young*, 592 N.Y.S.2d 905, 907 (N.Y. Surr. Ct. 1992), quoting the Restatement (Second) of Torts, section 774B, cmt. d ("There must be proof amounting to a reasonable degree of certainty that the bequest or devise would have been in effect at the time of the death of the testator or that the gift would have been made inter vivos if there had been no such interference.")

[41] *Robinson v. First State Bank of Monticello*, 454 N.E.2d 288, 293 (Ill. 1983) (Tort action for intentional interference with inheritance was not allowed where the plaintiffs decided not to contest will, entered into settlement agreement, and allowed the statutorily prescribed period in which to contest the will to expire.); *DeWitt v. Duce*, 408 So. 2d 216 (Fla. 1981) (Plaintiffs were precluded from proving their claim for tortious interference with an inheritance where they had an opportunity to contest the validity of the alleged wrongfully procured will and declined to do so.).

or trust, can also be appealing to a plaintiff. Finally, many plaintiffs who are otherwise beneficiaries of the estate or trust at issue will often claim that the alleged tortfeasor cannot defend using estate or trust funds, even if they are also the fiduciary who could defend a will or trust contest using estate or trust funds.

A. Applicability of Tort

Perhaps the most significant limit to filing the tort, which applies in many of the jurisdictions in which the tort is recognized, is that the intentional tort cannot be used to circumvent the statute of limitations for filing a will or trust contest.[42] In other words, the tort typically must be filed within the time-frame for successfully contesting the will or trust, when the allegations include claims that the will or trust document is invalid and amount to the diversion of a testamentary expectancy.[43]

Many states require a successful will or trust contest, or at least a legally sufficient complaint regarding these documents, when the alleged tort diversion involves obtaining a change to a testamentary document, before the tort can proceed.[44] In addition, often the plaintiff must have damages separate and apart from what could be recovered under traditional probate remedies, in order for the cause of action to proceed.[45] This can be a barrier to pursuing the tort, which often can be stayed pending the outcome of an estate or trust contest, to the extent successfully challenging testation would be a requirement for a successful tort outcome.

B. Defenses

The most effective defense to intentional interference with a testamentary expectancy is a broad in terrorem clause which expressly includes pursuing the tort as a disqualifying event, regardless of who is the defendant or target, coupled with a direction to the executor and trustee to defend the tort and pay for the defense out of the estate or trust. This would be true even if the potential defendant in the tort case is not the executor or trustee.[46] This type of in terrorem clause, if enforced, completely undercuts the economic leverage that a plaintiff filing the intentional tort would otherwise achieve. It removes the pressure on the alleged tortfeasor to defend the case with personal funds, and places the estate or trust which is the ultimate bounty, at risk for the burden of the expense of defense.

Since the testamentary expectancy must, in most jurisdictions, be established with a testamentary document which would be effective but for/the tortious interference, the tort action creates an incentive on potential defendants to actually destroy prior versions of the Decedent's estate plan. This actually runs counter to the traditional defensive posture in most jurisdictions for will and trust contests, since prior documents can both be used as evidence of consistent plans, and may form practical barriers to heirs seeking to completely obliterate a testation which can only occur in their favor when all versions of the testamentary document have been invalidated. Since most jurisdictions do not allow for the joinder of separate will and trust contests, separated by time spans in execution, there is an incentive to save old testamentary documents, including prior versions of trusts and trust amendments, for use as evidence and for barriers against intestacy. If these prior documents do not exist, it can make proving up the first element of the tort, existence of the testamentary expectancy, difficult for a plaintiff. The drafting or planning attorney should consider carefully whether the intentional tort is available and is an equal or greater threat than a will or trust contest, as it may trump the incentives to keep prior testamentary documents intact and in protective custody.

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[42] *See* Appendix D.

[43] *See Robinson*, 454 N.E.2d at 294 (Tort action will not be allowed where its practical effect would be to circumvent the purpose of statute setting a six-month time limit within which the validity of will may be questioned.); *but see Barone v. Barone*, 294 S.E.2d 260, 264 (W. Va. 1982) (Tort was not within probate court jurisdiction and not covered by probate statute of limitations.).

[44] *See* Appendix D.

[45] *Nemeth v. Banhalmi*, 425 N.E.2d 1187 (Ill. App. Ct. 1981) (Plaintiff was a devisee under two prior wills, and an expectancy derived from steps taken by decedent on two occasions toward protecting the plaintiff's expectancy was sufficient to allege a cause of action for the tort.); *McGregor v. McGregor*, 101 F. Supp. 848, 850 (D. Colo. 1951) aff'd, 201 F.2d 528 (10th Cir. 1953) ("the courts have ruled with almost unanimity that before the deprived legatee can seek relief in a tribunal other than the proper probate court, an attempt first must have been made to probate the will which is alleged to give rise to the claim, or that, in the alternative, it must be alleged and shown that such probate is impossible under the circumstances of the particular case."); *Griffin v. Baucom*, 328 S.E.2d 38, 42 (N.C. Ct. App. 1985) ("where no will was submitted for probate and where facts exist indicating that inadequate relief was available in a probate proceeding, plaintiffs were not required to first seek to prove the revoked will in a probate proceeding before pursuing their tortious interference claim.").

[46] *See* Section III.D.2, *supra* (providing sample in terrorem clause language).

It will be the rare case of tortious interference with a testamentary expectancy where some aspect of the relief sought by the plaintiff is not premature, pending the outcome of a will or trust contest. This is particularly true with torts that arise from allegedly invalid inter vivos transfers of property out of the decedent's estate or trust. Unless the testamentary documents would immediately place any recovered assets in the hands of the plaintiff, it is an effective defense to obtain a stay of the tort case pending the outcome of the will or trust contest. It is more difficult in most jurisdictions to successfully invalidate testamentary documents on grounds of undue influence or capacity than it is to meet the burden of tortious interference with a testamentary expectancy, even if an element of the tort is obtaining a will or trust amendment by undue influence.[47] A stay of the tort proceeding may have many of the same defensive benefits as use of the in terrorem clause to take financial pressure off the alleged tortfeasor by relieving him or her of defense costs.

C. 50 State Survey

The 50 State Survey attached as Appendix D shows the current state of the tort in the 50 states. Note the jurisdictions which link a successful prosecution of the tort with a successful prosecution of the will or trust contest. Many of the jurisdictions which have not yet addressed the issue may well, on a defense motion, come to the conclusion that successfully setting aside testamentary documents is prerequisite to proceeding with the tort.

V. Preventing Post-Death Modification of Estate Plan

Virtually all testators want their wishes to be followed, if not expressly, then in substance. Thirty years ago, there were very few statutory provisions that allowed for modification of irrevocable documents, and those that did pertained to tax-driven reformations that virtually any testator would favor because the plan was preserved and beneficial tax treatments were applied.

Over the last three decades, a number of states have enacted statutes that allow beneficiaries and courts to modify wills, trusts and irrevocable instruments by agreement, court action or otherwise. These statutes generally take four forms: (1) Decanting, which is used to distribute trust property from an existing irrevocable trust to a new trust; (2) Unitrust Conversion, which is used to convert a mandatory income trust keyed to trust accounting income, to a "total return trust," which pays out a fixed percentage of the value of the trust assets to the same beneficiary or beneficiaries; (3) Directed Trusts, which involve shifting fiduciary powers and responsibilities from the persons or institutions named in the document to either different persons and institutions, or to the same persons and institutions with direction and input from third parties, such as advisers and protectors; and (4) Nonjudicial Settlement Agreements, which typically are embedded in "Virtual Representation" statutes, and which permit in-court or out-of-court agreements that substantially modify, and in some cases even terminate, trusts.

These modification tools, which are typically codified by statute (though there are a few states that allow some of these acts through common law), give the courts and, in some cases, the beneficiaries the power to substantially change or obliterate a testator's intent. Therefore, anticipating them, managing them and, where appropriate and necessary, preventing their use, can be an important part of guaranteeing that a testator's wishes are followed.

Though many of these statutes provide for a statutory carve out, such carve outs often require a specific reference in the will or trust to the statute at issue, which would be impossible in the case where the document was executed before the statute existed, and may be overlooked by a estate planning attorney even after the statutory carve-out is available. Therefore, it is important to be familiar with these modification tools, and understand how best to prevent their use or limit their application when a testator insists that his or her express wishes be followed.

A. Choice of Law

Statutory modification tools differ in scope, availability and applicability, from jurisdiction to jurisdiction. Therefore, identifying the instrument's governing law, and making sure that the governing law selected has

[47] *See Robinson v. First State Bank of Monticello*, 97 Ill. 2d 174, 182-83, 186 (1983) (the Illinois Supreme Court refused to allow the plaintiffs to circumvent the procedural protections afforded to wills and trusts by filing a "tort action which in its practical effect would invalidate a will that has become valid under the [Illinois Probate Act]"); *In re Estate of William Roeseler*, 287 Ill. App. 3d 1003, 1021 (1997) ("If a will contest is available and would provide an adequate remedy to the petitioner, no tort action will lie.").

some nexus to the testation that would allow it to govern, can be extremely important in limiting the scope and application of statutory modification techniques. For example, many states do not provide for decanting and some states either do not allow use of nonjudicial settlement agreements to modify trusts, or limit their application to modifications that are either non-terminating or in some regards non-substantive.[48] Therefore, a testator with the desire to limit any future modification of the document, residing in a jurisdiction with statutory modification techniques available, will want to consider shifting governing law to a more restrictive jurisdiction.

Choice of law is not unlimited—a will is almost always going to be governed by the law of the state in which the estate is administered, and a trust with no nexus to a given jurisdiction may not be able to take advantage of that jurisdiction's laws. Nonetheless, there are steps which can be taken to improve the efficaciousness of a choice of law clause, particularly with respect to a trust. Delaware law is sometimes chosen by testators with a desire to limit modification, because it has fairly well-defined provisions on nonjudicial settlement agreements, and appointing a Delaware fiduciary, adviser, or investment adviser under a directed trust may also be sufficient to have a non-Delaware resident effectively apply Delaware as governing law for a trust. It may also be enough that a significant asset to be held and disposed of by the trust instrument is a Delaware company.

Choice of law also matters because the methods and terminology used to limit or eliminate the availability of these modification techniques differs from state to state. It is important to fully analyze available state laws before addressing modification techniques in a decedent's will or trust.

B. Decanting

In twenty-three states, decanting is governed by statute.[49] Because these statutes are relatively new, virtually all of them allow for a carve out in a trust document so that decanting can expressly be eliminated.[50]

The statutory reference at issue may be required to include a citation to the relevant statute. Because choice of law may not be locked in at death, consideration should be given to multiple state cross references, with a general mop-up provision. In addition, decanting can apply to modify both powers of appointment and discretionary distribution provisions, so a carve out should expressly address whether it is to be applied to discretionary distributions, power exercises or both.[51]

C. Unitrust Conversion

Since unitrust conversion was unknown as common law, it applies everywhere only by statute. Therefore, statutory carve outs are generally available, many require statutory cross reference, and must be used to eliminate trustee or beneficiary driven conversion to unitrust pay out percentages. Unitrust payment conversion opt outs are particularly important with testators who have restrictive distribution provisions that they want followed for prophylactic, punitive or other reasons. The person who insists that the pay out from a trust be a percentage or set amount of the accounting income or a formula based on accounting income, could be easily defeated by unitrust conversion unless the document expressly prohibits it.[52]

D. Directed Trusts

Directed trusts, like unitrust conversions, are governed by statute. Therefore, the estate planning attorney should carefully adhere to the statute and expressly reference any statutory carve outs, including citations to

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[48] *See* Appendix E.
[49] *See Id.* Iowa and New Jersey purport to have common law decanting. *See Wiedenmayer v. Johnson*, 254 A.2d 534 (N.J. Super. Ct. App. Div. 1969); *In re Estate of Spencer*, 232 N.W.2d 491 (Iowa 1975).
[50] *See* Appendix E.
[51] *See, e.g.*, Nev. Rev. Stat. § 163.556; 735 Ill. Comp. Stat. Ann. 5/16.4(c) (power to change beneficiaries); 760 Ill. Comp. Stat. Ann. 5/16.4(c)(2) (power to modify powers of appointment); N.H. Rev. Stat. Ann. § 564-B:4-418(b) (power to change beneficiaries); N.C. Gen. Stat. § 36C-8-816.1(b) (power to change beneficiaries); N.C. Gen. Stat. § 36C-8-816.1(c)(8) (power to modify powers of appointment).
[52] *See* Appendix E.

the applicable statutory provisions, if the testator desires to preserve the control and management of trust property or investment.

In addition to directed trust statutes, many delegation provisions in various trust codes can have the same effect as creating a directed trust. However, most trust codes expressly state that the terms of the trust, including most delegation provisions, prevail over state law. Therefore, it would make sense, in a document designed to prevent a directed trust conversion, by decanting or otherwise, to contain express provision prohibiting delegation of management, custody or investment power, as the case may be. Generally, overriding Trust and Trustees Acts can occur by inconsistent document provisions regardless of express reference to the statute; nonetheless, an express reference to the relevant statute is sometimes required and would be prudent.

E. Protectors and Advisors

Many states now provide by statute for coordinated provisions for advisors, protectors and similar third parties with the power to amend or modify irrevocable trust documents. The same statutes typically provide for a statutory opt out, and that opt out should be used if there is a desire to either prevent the appointment of advisors, or, more commonly, make certain that those advisors and protectors who are appointed cannot make document modifications. This requires more specific drafting, as it may not be an issue of statutory carve out but instead simply making the decedent's intention clear, that the protectors should only be allowed to do X or Y or Z, or otherwise expressly limit the things they can do.[53]

F. 50 State Survey

The 50 State Survey attached as Appendix E provides the statutory carve outs for decanting, nonjudicial settlement agreements, and unitrust conversions, and summarizes the required manner in which the opt-out must be provided for in the trust instrument (for example, by a specific citation to the relevant statute).

VI. Planning in Anticipation of Difficult Beneficiaries.

While much attention is paid to measures that can be taken to prevent or mitigate the effects of a contest, estate planning attorneys more often confront the situation where one of the potential beneficiaries poses a danger to the post-death administration. As a result of that beneficiary's contentious relationship with other family members, a substance abuse problem, or a manipulative spouse, a beneficiary may be primed to unnecessarily challenge the actions of the fiduciary during the administration. Such problematic beneficiaries can put the fiduciary in a defensive posture and cause unnecessary litigation that delays the administration and significantly increase its costs, to the detriment of the other beneficiaries and the testamentary desires of the decedent. While the estate planning attorney is unable to control the actions of a problematic beneficiary during the administration, he or she can take steps in the planning process to mitigate the impact of such beneficiaries.

A. Structuring the Gift to a Problematic Beneficiary

The threshold issue to consider when confronting a problematic beneficiary is the manner in which the gift to such beneficiary should be structured. While most clients desire to treat members of the same class equally, doing so in the face of a problematic beneficiary could give that beneficiary standing to challenge every action of the fiduciary during the entire course of the administration. In order to mitigate that risk, the estate planning attorney should consider structuring the gift to the problematic beneficiary in a manner that reduces the beneficiary's ability to challenge the actions of the fiduciary.

1. Specific and Pecuniary Gifts

Residuary beneficiaries enjoy the broadest possible standing in a trust or estate administration because every transaction that occurs during the administration impacts the amount of the distribution residuary beneficiaries ultimately will receive. If a gift to a problematic beneficiary is structured as a residuary gift, then the fiduciary will be exposed to virtually unlimited criticism from the problematic beneficiary during the entire course of the administration. One method to

[53] *See Id*.

mitigate this risk is to structure the gift to the problematic beneficiary as a specific gift of a particular asset or a pecuniary gift of a dollar amount rather than as a residuary gift. By limiting the interest of the problematic beneficiary to a particular asset or a dollar amount, the fiduciary can argue that the problematic beneficiary lacks standing to complain about aspects of the administration that do not impact the subject matter of the problematic beneficiary's gift.[54]

When structuring the gift to a problematic beneficiary as a specific or pecuniary gift, it is important to review the transfer tax allocation clause to ensure that the gift to the problematic beneficiary bears its share of estate tax. To further mitigate the risk to the fiduciary, the instrument should provide that any pecuniary gift earns no interest and the fiduciary has wide latitude regarding both the timing of the distribution and, if in kind satisfaction of the pecuniary gift is to be permitted, the selection of assets used the satisfy the gift.

2. Gifts in Trust

If the problematic beneficiary is to be a beneficiary of an on-going trust, the estate planning attorney must decide how to structure the dispositive terms of the trust to mitigate exposure of the trustee.

It may be wise to avoid making the problematic beneficiary a beneficiary of a pot trust. Doing so could result in the actions of the problematic beneficiary impairing the interests of the other beneficiaries, particularly since a fiduciary may have a difficult time allocating attorneys' fees and other expenses against the undefined interest of the problematic beneficiary in a pot trust. By creating a separate trust for the problematic beneficiary, any problems caused by that beneficiary are isolated to that trust and should not impair the fiduciary's administration of trusts for other beneficiaries.

Fiduciary exposure is minimized if distributions to problematic beneficiaries are objectively determined, both in time and amount. By providing an objective standard for distributions, the trustee is precluded from exercising discretion, and the problematic beneficiary is precluded from complaining about the trustee's exercise of discretion. Examining a common distribution term illustrates this concept. Assume a trust for a problematic beneficiary requires the trustee to distribute net income of the trust to the beneficiary at least annually. While this distribution term provides an objective standard for the timing of the distribution, it provides a subjective standard for the amount of the distribution since the amount of net income is dependent on the manner in which the trust estate is invested. Obviously, the subjective nature of the investment plan, and whether it is skewed in favor of principal at the expense of income, gives the problematic beneficiary plenty of material for complaints. However, if the trust requires annual distribution of a unitrust amount, rather than net income, the risk to the trustee is mitigated to a small degree. While the problematic beneficiary may be precluded from complaining that the trustee is investing the assets in a way that enhances the principal at the expense of the income, it does not mitigate the possibility that the beneficiary will complain that the overall investment of the trust is inadequate. In order to completely mitigate the risk, the distribution to the beneficiary would have to be structured in a completely objective manner, such as an annual annuity amount tied to a consumer price index escalator that can be objectively calculated in order to account for inflation each year. By making the distribution terms completely objective, arguably the problematic beneficiary lacks standing to complain about the actions of the trustee since those actions do not impact the beneficiary's interest.[55]

If the client determines that an objectively determined distribution scheme is not appropriate, and would like to give the trustee discretion in making distributions, it may be wise to give the trustee as much discretion as possible rather than tie such discretion to a standard. If a beneficiary is

[54] Standing typically requires that the claimant suffer some sort of injury. *See, e.g., Lincoln Title Company v. Nomanbhoy Family Limited Partners,* 2013 Il.App(3d) 120999 (2013) (standing requires an actual or claimed injury that is (1) distinct and palpable, (2) fairly traceable to the defendant's actions, and (3) substantially likely to be prevented or redressed by the requested relief).

[55] Of course, that would not be the case if the trustee causes the trust to become unable to make the objectively determined distribution to the problematic beneficiary. In that case, the problematic beneficiary has every right to, and should, seek appropriate recourse from the trustee.

entitled to distributions from a trust for his or her health, education, support, or maintenance, the beneficiary may have standing to commence a proceeding against the trustee to compel a distribution. If, on the other hand, the trustee has sole and absolute discretion to make distributions of the beneficiary as it deems appropriate, the beneficiary will have less grounds on which he or she can complain about the trustee's exercise, or failure to exercise, that discretion. Some states imply a reasonableness standard even when the trust instrument gives the trustee sole and absolute discretion.[56] Even when faced with such a standard, however, the trustee may prefer to face a reasonableness standard than a ascertainable standard since a reasonableness standard is likely easier to defend.

B. Modifying Fiduciary Duties

All state laws impose fiduciary duties on trustees. In most states, however, the statutory fiduciary duties imposed on trustees constitute default rules and, in varying degrees, can be modified by the trust instrument.[57] The extent to which the trust instrument can modify statutory fiduciary duties varies from state to state. The duties typically subject to modification include the duty to prudently invest, the duty to allocate between income and principal, the duty of loyalty, and the duty of impartiality.[58] The duties typically not subject to modification include the duty to maintain records and the duty to inform beneficiaries.[59] In some states virtually all fiduciary duties can be waived. In Delaware, for example, the trust instrument "may expand, restrict, eliminate or otherwise vary the rights and interests of the beneficiaries" including the trustee's "duties, standard of care, [and] rights of indemnification and liability."[60]

By customizing fiduciary duties to address issues likely to be raised by a problematic beneficiary, the estate planning attorney can provide extraordinary protection for the trustee. For example, if the client is concerned that a problematic beneficiary will complain the trustee is favoring other beneficiaries over her, the trust instrument could waive the duty of impartiality to allow such favoritism. Taken further, if a client wants to prevent the problematic beneficiary from having any knowledge of the trust and preclude the problematic beneficiary from enforcing any duty on the trustee, the trust instrument can name a trustee in a jurisdiction, such as Delaware, that allows broad waivers of fiduciary duties and select that state's law to apply for the administration of the trust.

One duty that the estate planning attorney should consider altering whenever there is a problematic beneficiary is the duty to make timely distributions. This is particularly true when estate tax will be required to be paid and assets from which a problematic beneficiary will bear a portion of that tax. An example of such a waiver of duty is as follows:

> **Delay in Distribution.** The trustee may, in the trustee's sole and absolute discretion, withhold making any distribution provided in paragraph 1.1 until six (6) months have elapsed after the earlier of the following: (1) the expiration of the period of limitations on the trustor's federal estate tax return (IRS Form 706) or (2) the date on which the federal estate tax obligation of the trustor's estate has been finally determined whether through an audit concluded through the agreement of the parties or through administrative or judicial proceedings. No beneficiary shall have standing to demand a distribution provided in this instrument before the expiration of the time period set forth in this paragraph that is applicable to such

[56] *See, e.g.*, Cal. Prob. Code § 16080 ("a discretionary power conferred on a trustee is not left to the trustee's arbitrary discretion, but shall be exercised reasonably").
[57] *See, e.g.*, Cal. Prob. Code § 16000 ("[o]n acceptance of the trust, the trustee has a duty to administer the trust according to the trust instrument and, *except to the extent the trust instrument provides otherwise*, according to [the duties set forth in the code]") (emphasis added).
[58] Schroer, *The Dangers of Relying on Trust Language*, 45 The Colorado Lawyer 55 (2016).
[59] *Id. See also* Cal Prob. Code § 16068 (waiver of the duty to provide terms of the trust and to provide information required by a beneficiary deemed to be against public policy).
[60] 12 Del. C. § 3303(a).

> beneficiary, and any expense incurred by the trustee in defending against such a demand, including any attorney's fees incurred (and regardless of whether a court proceeding is commenced), shall be allocated against such beneficiary's share of the trust estate.

Since modifying a fiduciary duty could give license for an unscrupulous trustee to commit bad acts against the beneficiaries, the estate planning attorney should tailor carefully the modification to address only the risk posed by the problematic beneficiary. The modified duty should apply just to the problematic beneficiary, and it should apply only with respect to a trustee selected by the client and not successor trustees appointed pursuant to appointment mechanisms provided in the trust instrument or by the court.

C. Trustee Exculpation

Unlike altering a fiduciary duty, which changes the standard by which a breach will be determined, trustee exculpation relieves the trustee from liability for an actual breach of fiduciary duty. Most states allow some form of trustee exculpation, although many do not allow unlimited exculpation. For example, under the Uniform Trust Code, which has been adopted in 37 states, a trustee may not be relieved from liability for breach of trust that is committed in "bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiary."[61] Other states, such as Delaware, allow virtually unlimited exculpation of the trustee.[62]

Trustee exculpation serves a similar purpose as a modification of fiduciary duties, and the same concerns apply. The estate planning attorney should draft carefully the exculpation clause to apply only the problematic beneficiary and only when designated people or entities are serving as trustee.

D. Use of Business Entities

It may be possible to mitigate the impact of a problematic beneficiary by causing such beneficiary's rights to flow primarily from a business entity rather from a trust. To accomplish this, the client would form a business entity that allows for a separation of the management and equity, such as a limited partnership or manager-managed limited liability company, and give the problematic beneficiary a non-management interest in that entity. The entity governing documents would provide that the problematic beneficiary may not unilaterally terminate the entity or remove and replace the manager. Similarly, the governing documents would provide significant restrictions on the problematic beneficiary's ability to transfer the entity interest and give the manager broad distribution to make, or not to make, distributions to the equity owners of the entity.

By using a business entity to provide for the on-going management of the problematic beneficiary's inheritance, the standards of conduct and liability associated with the business entity will apply. As a general rule, those standards of conduct and liability protect business entity managers to a much greater degree than the standards of conduct and liability of trusts protect trustees.[63] Business entities also allow for a heightened ability to exonerate and provide indemnity to managers. Most importantly, forum shopping is significantly easier with a business entity than it is with a trust. In order to have a trustee-friendly law, such as Delaware, apply to a trust, one must, at the very least, have a Delaware-resident trustee. By contrast, to invoke Delaware law for a business entity one need only form the entity in that state.

If the business entity is to be owned by a trust for the benefit of the problematic beneficiary, one must consider whether the same person should serve as both trustee of the trust and manager of the business entity. If the same person serves as both as trustee and manager, the question becomes whether that person

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[61] UTC § 1008; *see also* Cal. Prob. Code § 16461 (exculpation not available for breach of fiduciary duty committed intentionally, with gross negligence, in bad faith, with reckless indifference of the interests of the beneficiaries, or if the trustee profits from the breach.

[62] 12 Del. C. § 3303(a).

[63] For example, the fiduciary duty owed by corporate directors is modified by the business judgment rule, which protects directors from breach of fiduciary duty claims if they acted in good faith, in the best interests of the corporation, on an informed basis, in a manner that was not wasteful, and not motivated by self-interest. *See Grobow v. Perot,* 539 A.2d 180 (Del. 1988).

will be bound by the entity-level fiduciary duty or the generally more strict trust-level fiduciary duty. This question remains unanswered in most state, although some states, most notably New York, would apply the stricter trust-level fiduciary duty.[64]

VII. Limiting Actions By a Successor Trustee

An often unanticipated source of problems for a trustee is a successor trustee. Generally, when a trustee leaves office, the successor trustee steps into the shoes of the predecessor trustee and may bring actions against the predecessor trustee for breach of fiduciary duty.[65] In some states, such as California, the successor trustee becomes the holder of the attorney-client privilege the predecessor trustee enjoyed with his or her attorney,[66] and has standing to bring a malpractice action against that attorney.[67] The actions of a successor trustee can be disruptive to the trust administration, and create great risk to the predecessor trustee, particularly if the successor trustee becomes allied with a problematic beneficiary. In order to protect a trustee favored by the client from such a fate, the estate planning attorney should consider curtailing the successor trustee's ability to bring actions against a predecessor trustee.

Virtually all trust instruments reduce or eliminate a successor trustee's duty to investigate the actions of a predecessor trustee. Reducing or eliminating the successor trustee's duty to investigate those acts, however, does not limit the successor trustee's power to do so. Also, since every trust instrument (and the applicable default law of virtually every state) gives the successor trustee the power to prosecute actions on behalf of the trust, the only way for the estate planning attorney to curtail the potentially destructive power of a successor trustee is to limit the trustee's powers. Specifically, the trust instrument can provide that a successor trustee does not hold the power to bring actions against a trustee favored by the client or that trustee's attorneys. An example of such a limitation is as follows:

> **Successor Trustees**. In the event that JANE DOE served as trustee and then is succeeded by one or more successor trustees, the following provisions shall apply to all such successor trustees (each a "Successor Trustee"):
>
> No Successor Trustee shall have a duty to investigate or bring any action against JANE DOE for any act or omission committed during her service as trustee and, notwithstanding the provisions of applicable law or paragraph 1.1 of this instrument, the Successor Trustee shall not have the power to bring any action, in law or equity, against JANE DOE, or any attorneys who represented JANE DOE, related to her service as trustee (or the transition of the office of trustee to a Successor Trustee) or as manager of any property or entity in which the trust estate has an interest (regardless of whether such action accrues after JANE DOE has ceased to serve as trustee).

VIII. Arbitration Clauses

A. Enforceability

Many attorneys believe that forcing litigants into mandatory, binding arbitration favors the status quo outcome and reduces the costs and burdens of litigation. While both of these conclusions are subject to debate, the risks and benefits of arbitration are complicated matters and well beyond the scope of this presentation. However, the use of arbitration clauses in testamentary documents designed to force potential will and trust contestants into binding arbitration, may be an effective means to preserve a testator's estate plan.

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[64] Connolly, *Which Hat Are You Wearing? Potentially Conflicting Fiduciary Duties for Director/Trustees of Trust-Owned Corporations*, Business Law Today, December 2015.

[65] *Moeller v. Superior Court*, 16 Cal.4th 1125 (1997).

[66] *Id* (attorney-client privilege with respect to trust administration communications belongs to the office of the trustee, not to any individual trustee occupying that office).

[67] *Kelly v. Orr*, 243 Cal.App.4th 940 (2016); *see also Stine v. Dell'Osso*, 230 Cal.App.4th 834 (successor conservator has standing to bring malpractice action against predecessor conservator's attorney).

Only five states have expressly addressed the use of mandatory arbitration clauses in testamentary documents by statute or case law and forced estate or trust litigants to arbitrate when testamentary documents require it.[68] The beneficiaries' due process rights are almost always the focus of a dispute over whether an arbitration clause in a testamentary document should be enforced; namely, whether a beneficiary can be forced to arbitrate where he or she has not expressly consented to giving up his or her access to the courts. Only one jurisdiction, the District of Columbia, expressly prohibits the use of mandatory arbitration clauses in testamentary documents.[69] In contrast, at least one Texas court has held that a beneficiary constructively consented to a mandatory arbitration clause in a testamentary document by accepting benefits under such document. [70]The California Court of Appeals has taken a middle ground approach.[71] The *McArthur* court held that the contestant could not be compelled to arbitrate pursuant to the testamentary document's mandatory arbitration clause where the contestant had not yet agreed to take anything pursuant to the document; however, any disputes over administration may be subject to mandatory arbitration. [72]

B. Drafting Suggestions

Given the developing state of the law, if the estate planning attorney believes the inclusion of a mandatory arbitration clause would be beneficial, he or she should not hesitate to include a broadly drafted arbitration clause that expressly applies to contests and disputes over administration. Consider the following sample language:

1. Mandatory Mediation and Arbitration.

Any person, entity, trust, trustee, estate or fiduciary, who claims an interest under my Will or this Trust and who seeks to pursue any Claim (defined below) regarding that person's or trust's or entity's interests under my Will or this Trust, shall be required to participate in mandatory mediation [and/or] binding arbitration, [in lieu of/before resorting to] pursuing any such Claim in formal litigation, including any court proceeding initiated by any person, trust or entity regarding that person's, trust's or entity's rights, claims or interests under my Will or this Trust.

a. Mediation required under this paragraph shall be conducted before [name individual/name agency/panel of three mediators, one of which is selected by the potential claimant, one of which is selected by my executor/trustee, and one of which is selected by agreement of the first two mediators described in this provision]. Mediation under this provision shall be conducted using the rules of [select a particular governing body's rules, such as JAMS or AAA]. No person, trust or entity pursuing a Claim shall be allowed to initiate arbitration pursuant to this paragraph until mediation is completed, which shall occur when the mediator, or, if three, two of the three mediators selected above, agree in writing that the medication has terminated.

b. Binding arbitration required under this paragraph shall be conducted before [name individual/name agency/panel of three Arbitrators, one of which is selected by the potential claimant, one of which is selected by my executor/trustee, and one of which is selected by agreement of the first two Arbitrators described in this provision]. Arbitration under this provision shall be conducted using the rules of [select a particular governing body's rules, such as JAMS or AAA].

c. The Arbitrator's decision shall be binding on all parties with an interest under my Will or this Trust, including the parties to the Binding Arbitration, my executor or trustee, and any other person or entity with an interest under my Will or this Trust, and the

[68] *See* Appendix F.
[69] *Id*.
[70] *See Rachal v. Reitz*, 403 S.W.3d 840, 842 (Tex. 2013).
[71] *See McArthur v. McArthur*, 168 Cal. Rptr. 3d 785 (Cal. Ct. App. 2014).
[72] *Id.* at 790.

Arbitrator's order shall be enforceable to the fullest extent of the law as though it was a judgment obtained from a court of competent jurisdiction.

d. The costs of any mediation conducted pursuant to this paragraph shall be charged to the estate or Trust under administration subject of the mediation. The costs of a Binding Arbitration shall be assessed by the Arbitrator or arbitration panel, as part of its arbitration award, and may be assessed against any party to the arbitration in any manner the arbitration panels sees fit.

e. For purposes of this paragraph, the term "Claim" shall herein mean:

2. Contests my will or any codicil thereto, any exercise of a power of appointment by me, either during life or at death, or any transfer of property by me to any person during my life or from any person to a trust identified in subparagraph (b) below;

3. Contests my revocable trust or any other trust created by me either during life or at death and whether by way of grant, exercise of power of appointment or otherwise, or any amendment to any of the foregoing;

4. Contests any discretionary action taken by the Executor or Trustee or any adviser or protector acting hereunder, including but not limited to the allocation, funding or distribution of the Trust or Estate property, sale or other disposition of any Trust or Estate property, retention of any Trust or Estate property for any length of time, or allocation, charges or payment of expenses to or from any Trust or Estate property.

5. Seeks to obtain a declaratory judgment regarding whether any action otherwise described or potentially described in this article violates the proscriptions of this article;

6. Brings any action in tort against my spouse, any of my descendants, any beneficiary under this document or any fiduciary (including, but not limited to the directors, officers, committee members or employees of any fiduciary, individually or in their official capacity) with any authority over any part of my estate or a trust identified in subparagraph (b) above, or against any beneficiary of my estate or a trust identified in subparagraph (b) above, which claims damages or other recovery, including but not limited to the imposition of a constructive trust over any of that person's property or property held in trust for the benefit of said person, alleging or asserting that said person in any way caused or is responsible for the procurement of my will or a trust identified in subparagraph (b) above, or in any other way caused the person bringing said tort or related claim to receive less property or value from my estate or a trust identified in subparagraph (b) above than said person bringing the claim or filing the lawsuit otherwise would have received;

7. Seeks to obtain an adjudication in any court with respect to my testamentary capacity, capacity to enter into binding contracts or mental capacity in general at any time; and

8. Cooperates or aids in any action described in the preceding provisions of this paragraph with any other person, regardless of whether that other person is himself or herself subject to this paragraph.

a. [optional] No person, trust or entity claiming any interest under my Will or under this Trust shall be allowed to proceed to formal litigation or filing of any pleading in court in furtherance of any Claim without complying fully with the terms of this paragraph and any Mediation or Arbitration required therein. A violation of this subparagraph will cause said person, trust or entity in violation to forfeit any interest that person, trust or entity has or may claim to have under my Will or this Trust.

Although the enforcement of such a clause is not guaranteed, the testator's intent is an important matter in disputes related to wills and trusts, and the expansive scope of the clause may be enough to persuade a jurisdiction to enforce it even though the litigants did not expressly consent to arbitrate.

C. 50 State Survey

The 50 state survey of state law regarding the enforcement of arbitration clauses in wills and trusts looks more like a six state survey, since only six states have directly addressed and disposed of this issue. The survey is attached as Appendix F.

APPENDIX A

FORM VIDEOTAPED EXECUTION AFFIDAVIT

Appendix A:
Form Videotaped Execution Affidavit

I, [Attorney], being dully sworn under oath, under penalties of perjury, do dispose and state as follows:

1. I represent [testator], who appeared before me, in my office on [date] for purposes of executing a Will and a Trust.
2. I supervised the execution of [client's] Will and Trust, in my office, between the hours of _____ and _____ on _____. Present where testator _____, witnesses _____, _____, _____, and videographer _____.
3. The videographer videotaped the execution conference in a continuous videotaping that began at _____ and ended at _____. There were no stops or pauses on the tape during the execution conference.
4. After the execution conference was complete, the videographer removed the videotape from the videotaping equipment in my presence, labeled it, "Videotape Execution Conference of Will and Trust for _____, dated _____", and handed the original, labeled videotape to me.
5. I then placed the videotape in an envelope, marked, "Videotape Execution Conference of _____", and placed the videotape in _____'s file. I then placed the file in file storage and made a record on the file of any removal of the videotape from the file.

Further affiant sayeth not.

Signature _____

APPENDIX B

50 STATE SURVEY OF ADMISSIBILITY OF VIDEOTAPED EXECUTION CONFERENCES AS EVIDENCE

Appendix B:
50 State Survey of Admissibility of Videotaped Execution Conferences As Evidence

STATE	Relevant Authority	Admissible?
Alabama		
Alaska		
Arizona		
Arkansas		
California		
Colorado		
Connecticut		
Delaware	"The video tape of Mrs. Stotlar on September 2, 1983, however, showed that she had to be reminded of the nature of her investments, and even after being reminded, she did not understand their nature, and the video tape of September 13, 1983 showed that her (and Stewart's) attorney avoided any mention of her assets." *Matter of Will of Stotlar*, No. CIV.A. 1149, 1987 WL 6091, at *5 (Del. Ch. Jan. 29, 1987)	Yes, subject to state evidentiary and hearsay rules
D.C.		
Florida	Lower court rejected undue influence claim based on expert testimony following review of medical records and videotaped will execution conference; appellate court did not find error. *Hall v. Hall*, 190 So. 3d 683, 685 (Fla. Dist. Ct. App. 2016)	Yes, subject to state evidentiary and hearsay rules
Georgia	Videotaped execution of testatrix's will which indicated that testatrix misstated ages of grandchildren and inaccurately stated amount of real property she owned did not demonstrate that testatrix lacked testamentary capacity at time of execution, where testatrix remembered persons that were related to her, her attorney testified that she requested same disposition of real property in separate meetings prior to execution of will, and subscribing witnesses testified that she was competent at time of execution, that she freely executed will, and fully understood ramifications of will's provisions. *Patterson-Fowlkes v. Chancey*, 291 Ga. 601, 732 S.E.2d 252 (2012).	Yes, subject to state evidentiary and hearsay rules
Hawaii		
Idaho		
Illinois		
Indiana	Ind. Code Ann. § 29-1-5-3.2: Subject to the applicable Indiana Rules of Trial Procedure, a videotape may be admissible as evidence of the following: (1) The proper execution of a will. (2) The intentions of a testator. (3) The mental state or capacity of a testator. (4) The authenticity of a will. (5) Matters that are determined by a court to be relevant to the probate of a will.	Statutory
Iowa		
Kansas		
Kentucky		

Appendix B:
50 State Survey of Admissibility of Videotaped Execution Conferences As Evidence

STATE	Relevant Authority	Admissible?
Louisiana	La. Code Civ. Proc. Ann. art. 2904: A. In a contradictory trial to probate a testament under Article 2901 or an action to annul a probated testament under Article 2931, and provided the testator is sworn by a person authorized to take oaths and the oath is recorded on the videotape, the videotape of the execution and reading of the testament by the testator may be admissible as evidence of any of the following: (1) The proper execution of the testament. (2) The intentions of the testator. (3) The mental state or capacity of the testator. (4) The authenticity of the testament. (5) Matters that are determined by a court to be relevant to the probate of the testament. B. For purposes of this Article, "videotape" means the visual recording on a magnetic tape, film, videotape, compact disc, digital versatile disc, digital video disc, or by other electronic means together with the associated oral record.	Statutory
Maine		
Maryland	Moreover, we have viewed the videotapes and, in our view, an inference can be drawn that is consistent with the claims of fraud and undue influence. *Geduldig v. Posner*, 129 Md. App. 490, 512, 743 A.2d 247, 259 (1999)	Yes, subject to state evidentiary and hearsay rules
Massachusetts		
Michigan		
Minnesota		
Mississippi		
Missouri		
Montana		
Nebraska	"State of mind" exception to hearsay rule applied to testator's statements regarding her intentions for the disposition of her property in video of testator executing the first of her two challenged wills, admitted in will contest alleging undue influence, after trial judge instructed jury to disregard specific questions asked by testator's attorney in video regarding influence and instructed jury that those questions and answers could not be considered evidence on issue of undue influence; also, probative value of video was not substantially outweighed by danger of unfair prejudice to will contestant's undue influence claim. *In re Estate of Clinger*, 292 Neb. 237 (2015).	Yes, subject to state evidentiary and hearsay rules
Nevada		
New Hampshire		
New Jersey		
New Mexico		
New York	Admission into evidence of videotape of will execution was not abuse of discretion, where videotape was not offered in attempt to probate document as will but, rather, as evidence of decedent's testamentary capacity, where three witnesses to will execution and attorney who supervised will execution testified that videotape was fair and accurate depiction of events which were filmed, and where attorney testified extensively as to chain of custody of videotape. *Matter of Estate of Burack*, 201 A.D.2d 561, 607 N.Y.S.2d 711 (1994)	Yes, subject to state evidentiary and hearsay rules
North Carolina		
North Dakota		

Appendix B:
50 State Survey of Admissibility of Videotaped Execution Conferences As Evidence

STATE	Relevant Authority	Admissible?
Ohio	"the most compelling evidence presented on the issue of testamentary capacity in the trial court was a videotape of the testator at the execution of the purported will. That tape discloses a man near the end of his life suffering the debilitating effects of a series of severe strokes; a man who at times appears totally detached from the proceedings. Viewing the tape clearly reveals the testator's inability to comprehend all that was going on about him." *Trautwein v. O'Brien*, No. 88AP-616, 1989 WL 2149, at *1 (Ohio Ct. App. Jan. 12, 1989).	Yes, subject to state evidentiary and hearsay rules
Oklahoma		
Oregon		
Pennsylvania		
Rhode Island		
South Carolina		
South Dakota		
Tennessee		
Texas	The summary judgment evidence consisted of several affidavits, several depositions, and a videotape of the signing of the will. *Hammer v. Powers*, 819 S.W.2d 669, 671 (Tex. App. 1991); The execution of the will was videotaped and introduced into evidence. *In re Estate of Foster*, 3 S.W.3d 49, 51 (Tex. App. 1999).	Yes, subject to state evidentiary and hearsay rules
Utah		
Vermont		
Virginia		
Washington		
West Virginia		
Wisconsin		
Wyoming		

APPENDIX C

50 STATE SURVEY OF STATE LAW ON IN TERROREM CLAUSES

Appendix C:
50 State Survey of State Law on In Terrorem Clauses

STATE	Wills	Trusts	Enforce (probable cause)	Enforce (regardless of probable cause or good faith)	Enforce (good faith)
Alabama	In terrorem clauses, to the extent they may be enforced in Alabama, are to be construed narrowly to avoid a forfeiture. *Harrison v. Morrow*, 977 So. 2d 457, 462 (Ala. 2007); *Kershaw v. Kershaw*, 848 So.2d 942 (Ala. 2002); *Donegan v. Wade*, 70 Ala. 501 (1881)			X	
Alaska	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. Alaska Stat. Ann. § 13.16.555	A provision in an inter vivos or testamentary trust purporting to penalize a beneficiary by charging the beneficiary's interest in the trust, or to penalize the beneficiary in another manner, for instituting a proceeding to challenge the acts of the trustee or other fiduciary of a trust, or for instituting other proceedings relating to the trust, is enforceable *even if* probable cause exists for instituting the proceedings. Alaska Stat. Ann. § 13.36.330	X - Wills	X - Trusts	
Arizona	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 that action. Ariz. Rev. Stat. Ann. § 14-2517; *In re Estate of Stewart*, 230 Ariz. 480 (App. 2012) (clause enforceable unless beneficiary had probable cause to contest).	Enforceable unless probable cause – *In re Shaheen Trust*, 236 Ariz. 498 (App. 2015) (no-contest provisions in trusts are governed by the Restatement, which suggests treating such clauses in wills and trusts the same).	X		

Appendix C:
50 State Survey of State Law on In Terrorem Clauses

STATE	Wills	Trusts	Enforce (probable cause)	Enforce (regardless of probable cause or good faith)	Enforce (good faith)
Arkansas	Enforceable, unless contest brought in good faith. *Seymour v. Biehslich*, 371 Ark. 359 (2007); but, no good faith exception to a "direct attack" on a will with a no-contest clause. *Sharp v. Sharp*, 2014 Ark. Appl. 645 (2014).	Enforceable – *Peterson v. Peck*, 2013 Ark. App. 666 (2013) ("Our supreme court has recognized the validity of no-contest clauses since at least 1937. *E.g.*, *Seymour v. Biehslich*, 371 Ark. 359 (2007); *Jackson v. Braden*, 290 Ark. 117 (1986); *Lytle v. Zebold*, 235 Ark. 17 (1962); *Ellsworth v. Ark. Nat'l Bank*, 194 Ark. 1032 (1937). However, because such clauses work a forfeiture, they are strictly construed. Restatement (Third) of Property § 8.5 cmt. d (2003); *Hamm v. Hamm*, 2013 Ark. App. 501 (2013)").		X	
California	Enforceable against specific types of contests – (1) direct contests brought without probable cause, (2) challenges to the transferor's ownership of property at the time of the transfer, if expressly included in the no contest clause, and (3) creditor's claims and actions based on them, if expressly included in the no contest clause. Probable cause exists if, at the time of filing a contest, the facts known to the contestant would cause a reasonable person to believe that there is a reasonable likelihood that the requested relief will be granted after an opportunity for further investigation or discovery. Cal. Prob. Code § 21311	§ 21311 applies to both will and trust contests. Cal. Prob. Code § 21310(b)(5); *Donkin v. Donkin*, 58 Cal. 4th 412, 314 P.3d 780 (2013) cert. denied, 135 S. Ct. 82, 190 L. Ed. 2d 37 (2014) (challenges to fiduciary misconduct do not trigger the forfeiture clause as a matter of public policy).	X		

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STATE	Wills	Trusts	Enforce (probable cause)	Enforce (regardless of probable cause or good faith)	Enforce (good faith)
Colorado	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. Colo. Rev. Stat. Ann. § 15-12-905; *In re Estate of Peppler*, 971 P.2d 694 (Colo. App. 1998).		X		
Connecticut	Enforceable except where a contest is begun in good faith, and there is probable cause and reasonable justification. *S. Norwalk Trust Co. v. St. John*, 92 Conn. 168, 101 A. 961, 963 (1917).		X		X
Delaware	Enforceable except for where the beneficiary is determined by the court to have prevailed substantially, and except for (1) any action brought by the trustee of a trust or the personal representative under a will; (2) any agreement among beneficiaries of the will or trust in settlement of a dispute relating to such will or trust; (3) any action to determine whether a proposed or pending motion, petition, or other proceeding constitutes a contest within the meaning of a no-contest provision; or (4) any action brought by a beneficiary under a will or trust instrument for a construction or interpretation of such will or trust instrument. Del. Code Ann. tit. 12, § 3329.	Enforceable – Del. Code Ann. tit. 12, § 3329.	Enforce unless beneficiary is successful.		

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STATE	Wills	Trusts	Enforce (probable cause)	Enforce (regardless of probable cause or good faith)	Enforce (good faith)
D.C.	In terrorem clauses are "valid and will be enforced notwithstanding good faith and probable cause in making the contest." *Ackerman v. Genevieve Ackerman Family Trust*, 908 A.2d 1200, 1202-03 (D.C. 2006), *quoting Barry v. American Security & Trust Co.*, 77 U.S.App. D.C. 351, 135 F.2d 470 (1943).	Although no-contest clauses appear most frequently in wills, there appears to be no reason to apply a different test in determining the validity of such a clause in a living trust instrument. *Ackerman v. Genevieve Ackerman Family Trust*, 908 A.2d 1200, 1203 (D.C. 2006) (internal quotations omitted).		X	
Florida	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. Fla. Stat. Ann. § 732.517.	A provision in a trust instrument purporting to penalize any interested person for contesting the trust instrument or instituting other proceedings relating to a trust estate or trust assets is unenforceable. Fla. Stat. Ann. § 736.1108.	Unenforceable.		
Georgia	A condition in terrorem shall be void unless there is a direction in the will as to the disposition of the property if the condition in terrorem is violated, in which event the direction in the will shall be carried out. Ga. Code Ann. § 53-4-68(b); *see also Cox v. Fowler*, 279 Ga. 501, 614 S.E.2d 59 (2005).	As a matter of public policy, in terrorem clauses may not be construed so as to immunize a fiduciary from the law that imposes certain duties upon and otherwise governs the actions of such fiduciaries. *See Sinclair v. Sinclair*, 284 Ga. 500, 502–503(2), 670 S.E.2d 59 (2008) (holding that "a condition in terrorem cannot make [a fiduciary] unanswerable for any violations of ... the laws governing personal representatives in Georgia"). *Callaway v. Willard*, 321 Ga. App. 349, 353, 739 S.E.2d 533, 536-37 (2013).	Enforceable if gift over clause.		

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STATE	Wills	Trusts	Enforce (probable cause)	Enforce (regardless of probable cause or good faith)	Enforce (good faith)
Hawaii	A provision in a will or trust purporting to penalize any interested person for contesting the will or trust or instituting other proceedings relating to the probate or trust estate is unenforceable if probable cause exists for instituting proceedings. Haw. Rev. Stat. Ann. § 560:3-905.	A provision in a will or trust purporting to penalize any interested person for contesting the will or trust or instituting other proceedings relating to the probate or trust estate is unenforceable if probable cause exists for instituting proceedings. Haw. Rev. Stat. Ann. § 560:3-905.	X		
Idaho	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. Idaho Code Ann. § 15-3-905.		X		
Illinois	"Generally, conditions in a clause against contesting the will or attempting to set it aside are valid. Even where they are held valid, though, conditions against contests are so disfavored by the courts that they are construed very strictly." *Wojtalewicz's Estate v. Woitel*, 93 Ill. App. 3d 1061, 1063, 418 N.E.2d 418, 420 (1981)	*Ruby v. Ruby*, 2012 IL App (1st) 103210, ¶ 29, 973 N.E.2d 361, 369, quoting *In re Estate of Wojtalewicz*, 93 Ill.App.3d 1061, 1063, 49 Ill.Dec. 564, 418 N.E.2d 418 (1981).		X	
Indiana	If, in any will admitted to probate in any of the courts of this state, there is a provision or provisions providing that if any beneficiary thereunder shall take any proceeding to contest such will or to prevent the admission thereof to probate, or provisions to that effect, such beneficiary shall thereby forfeit any benefit which said will made for	A provision in a trust that provides, or has the effect of providing, that a beneficiary forfeits a benefit from the trust if the beneficiary contests the trust is void. Ind. Code Ann. § 30-4-2.1-3.	Unenforceable.		

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STATE	Wills	Trusts	Enforce (probable cause)	Enforce (regardless of probable cause or good faith)	Enforce (good faith)
	said beneficiary, such provision or provisions shall be void and of no force or effect. Ind. Code Ann. § 29-1-6-2.				
Iowa	A testator may legally impose upon a legacy or devise a condition against attack upon the will, whether the gift be of realty or personalty and irrespective of the presence or absence of a gift over, but such condition will not be enforced against one who contests the will in good faith and for probable cause. *In re Estate of Cocklin*, 236 Iowa 98, 17 N.W.2d 129 (1945); *see also Geisinger v. Geisinger*, 241 Iowa 283, 294, 41 N.W.2d 86, 93 (1950); *see also Estate of Workman*, No. 16-0908, 2017 WL 706342 (Iowa Ct. App. Feb. 22, 2017).		X		X
Kansas	A *bona fide* belief in the invalidity of the will and with probable cause prevents the application of an in terrorem clause as to a beneficiary under the will. *In re Foster's Estate*, 190 Kan. 498, 500, 376 P.2d 784, 786 (1962); *see also In re Estate of Mahoney*, 347 P.3d 1214 (Kan. Ct. App. 2015), review denied (Jan. 25, 2016).	A no-contest clause in a trust serves the same purpose as such a clause in a will and is construed according to the same rules applied to wills. *Hamel v. Hamel*, 296 Kan. 1060, 1075, 299 P.3d 278, 288 (2013); no-contest provisions are to be strictly construed. *Matter of Trust of Hildebrandt*, No. 115,530, 2017 WL 128836, at *5 (Kan. Ct. App. Jan. 13, 2017).	X		X

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STATE	Wills	Trusts	Enforce (probable cause)	Enforce (regardless of probable cause or good faith)	Enforce (good faith)
Kentucky	Enforceable – *Johnson v. Smith*, 885 S.W.2d 944, 945–946 (Ky.1994); *Dravo v. Liberty Nat. Bank & Trust Co.*, 267 S.W.2d 95, 96 (Ky. 1954)	Although enforceable in Kentucky, no-contest provisions are strictly construed and are not extended beyond their express terms. *Commonwealth Bank & Trust Co. v. Young*, 361 S.W.3d 344, 352 (Ky. Ct. App. 2012).		X	
Louisiana	If the clause in question were restricted to protests or challenges by the legatees receiving a benefit from the will, there would be little problem in the absence of forced heirs. *Succession of Kern*, 252 So. 2d 507, 510 (La. Ct. App. 1971).	Trust beneficiary was not a "named legatee" under testator's will, and thus she was not subject to the will's in terrorem clause, which only applied to named legatees. *In re Succession of Scott*, 950 So. 2d 846 (La. Ct. App. 2006).		X	
Maine	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. Me. Rev. Stat. tit. 18-A, § 3-905		X		
Maryland	If probable cause exists for instituting proceedings, a provision in a will purporting to penalize an interested person for contesting the will or instituting other proceedings relating to the estate is void. Md. Code Ann., Est. & Trusts § 4-413		X		
Massachusetts	A provision in a will purporting to penalize an interested person for contesting the will or instituting other proceedings relating to the estate is enforceable. Mass. Gen. Laws Ann. ch. 190B, § 2-517			X	

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STATE	Wills	Trusts	Enforce (probable cause)	Enforce (regardless of probable cause or good faith)	Enforce (good faith)
Michigan	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 proceedings. Mich. Comp. Laws Ann. § 700.2518, § 700.3905	A provision in a trust that purports to penalize an interested person for contesting the trust or instituting another proceeding relating to the trust shall not be given effect if probable cause exists for instituting a proceeding contesting the trust or another proceeding relating to the trust. Mich. Comp. Laws Ann. § 700.7113	X		
Minnesota	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 proceedings. Minn. Stat. Ann. § 524.2-517		X		
Mississippi	Forfeiture provisions in wills are enforceable unless a contest is brought in good faith and based on probable cause. *Parker v. Benoist*, 160 So. 3d 198 (Miss. 2015).	Enforceable according to the express terms of the no-contest provision without regard to the beneficiary's good or bad faith in taking the action that would justify the complete or partial forfeiture of the beneficiary's interest in the trust under the terms of the no-contest provision unless probable cause exists for the beneficiary taking such action on the grounds of fraud, lack of capacity, mistake, and other challenges to document validity. Specifically excludes challenges to fiduciary conduct. Miss. Code Ann. § 91-8-1014.	X - Wills	X - Trusts	X - Wills

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STATE	Wills	Trusts	Enforce (probable cause)	Enforce (regardless of probable cause or good faith)	Enforce (good faith)
Missouri	Enforceable, without exception for probable cause. *Rossi v. Davis*, 345 Mo. 362, 376, 133 S.W.2d 363, 369 (1939); *Cox v. Fisher*, 322 S.W.2d 910, 915 (Mo. banc 1959); *see also Chaney v. Cooper*, 954 S.W.2d 510, 519 (Mo.App.W.D.1997).	*Tobias v. Korman*, 141 S.W.3d 468, 477 (Mo.App.E.D.2004) (generally unfavored by the law, a no-contest clause is to be enforced where it is clear that the trustor (or testator) intended that the conduct in question should forfeit a beneficiary's interest under the trust (or will)); *Labantschnig v. Bohlmann*, 439 S.W.3d 269, 273-74 (Mo. Ct. App. 2014); *see also Estate of Keen*, 488 S.W.3d 73 (Mo. Ct. App. 2016). See list of certain actions under Mo. Ann. Stat. § 456.4-420 that do not count as a no-contest action (*e.g.*, filing claim for accounting).		X	
Montana	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 proceedings. Mont. Code Ann. § 72-2-537		X		
Nebraska	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. Neb. Rev. Stat. Ann. § 30-24,103		X		
Nevada	A devisee's share must not be reduced or eliminated under a no-contest clause because the devisee institutes legal action	A beneficiary's share must not be reduced or eliminated under a no-contest clause in a trust because the beneficiary	X		X

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STATE	Wills	Trusts	Enforce (probable cause)	Enforce (regardless of probable cause or good faith)	Enforce (good faith)
	seeking to invalidate a will if the legal action is instituted in good faith and based on probable cause that would have led a reasonable person, properly informed and advised, to conclude that the will is invalid. Nev. Rev. Stat. Ann. § 137.005(4).	institutes legal action seeking to invalidate a trust, any document referenced in or affected by the trust, or any other trust-related instrument if the legal action is instituted in good faith and based on probable cause that would have led a reasonable person, properly informed and advised, to conclude that the trust, any document referenced in or affected by the trust, or other trust-related instrument is invalid. Nev. Rev. Stat. Ann. § 163.00195			
New Hampshire	A no-contest provision shall be enforceable according to the express terms of the no-contest provision without regard to the presence or absence of probable cause for, or the beneficiary's good or bad faith in, taking the action that would justify the complete or partial forfeiture of the beneficiary's interest in the will under the terms of the no-contest provision. N.H. Rev. Stat. Ann. § 551:22(II).	A no-contest provision shall be enforceable according to the express terms of the no-contest provision without regard to the presence or absence of probable cause for, or the beneficiary's good or bad faith in, taking the action that would justify the complete or partial forfeiture of the beneficiary's interest in the trust under the terms of the no-contest provision. A no-contest provision shall be unenforceable to the extent that the trust is invalid because of fraud, duress, undue influence, lack of testamentary capacity, or any other reason. In the case of an action solely to challenge the acts of the trustee or other fiduciary of the trust, a no-contest provision shall be unenforceable to the extent that the trustee or		X	

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STATE	Wills	Trusts	Enforce (probable cause)	Enforce (regardless of probable cause or good faith)	Enforce (good faith)
		other fiduciary has committed a breach of fiduciary duties or breach of trust. N.H. Rev. Stat. Ann. § 564-B:10-1014(b).			
New Jersey	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. N.J. Stat. Ann. § 3B:3-47	In terrorem clauses in a will or trust agreement are unenforceable where there is probable cause to challenge the instrument; such rule applies to contests of wills predating statute rendering in terrorem clauses unenforceable if probable cause for a will contest exists. *Haynes v. First Nat. State Bank of New Jersey*, 87 N.J. 163, 432 A.2d 890 (1981)	X		
New Mexico	A provision in a governing instrument purporting to penalize an interested person for contesting a governing instrument or instituting other proceedings relating to a governing instrument or an estate is unenforceable if probable cause exists for instituting proceedings. N.M. Stat. Ann. § 45-2-517		X		
New York	A no-contest clause is operative despite the presence or absence of probable cause for such contest, except: (1) contest to establish the will is a forgery or that it was revoked by a later will,	Although N.Y. EPTL § 3-3.5 governs wills, lifetime trusts can also contain in terrorem clauses. *See, e.g., Tumminello v. Bolton*, 59 A.D.3d 727, 873 N.Y.S.2d 731 (2d Dep't		X	

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STATE	Wills	Trusts	Enforce (probable cause)	Enforce (regardless of probable cause or good faith)	Enforce (good faith)
	provided that such contest is based on probable cause; (2) contest by an infant or incompetent; (3) the assertion of an objection to the jurisdiction of the court in which the will was offered for probate; (4) the disclosure to any of the parties or to the court of any information relating to any document offered for probate as a last will; (5) a refusal or failure to join in a petition for the probate of a document as a last will, or to execute a consent to, or waiver of notice of a probate proceeding; (6) the preliminary examination, of a proponent's witnesses, the person who prepared the will, the nominated executors and the proponents in a probate proceeding; and (7) the institution of, or the joining or acquiescence in a proceeding for the construction of a will or any provision thereof. N.Y. EPTL § 3-3.5(b).	2009) (beneficiary had no standing to object to accounting, having lost her bequest when she challenged validity of trust in another proceeding).			
North Carolina	The purpose of provision in will that contestant shall forfeit any interest he might have under will is to prevent vexatious litigation by disappointed beneficiaries and such provision is valid in law, but where contestant acts in good faith and on probable cause, such a condition in will is not binding and under such circumstances a contest does not work a forfeiture. *Ryan v. Wachovia Bank & Trust Co.*, 235 N.C. 585, 70 S.E.2d 853 (1952)	Same for trust. *Russell v. Wachovia Bank, N.A.*, 370 S.C. 5, 13, 633 S.E.2d 722, 726 (2006)	X		X

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STATE	Wills	Trusts	Enforce (probable cause)	Enforce (regardless of probable cause or good faith)	Enforce (good faith)
North Dakota	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 proceedings. N.D. Cent. Code Ann. § 30.1-20-05		X		
Ohio	Enforceable, regardless of good faith or probable cause. *Bender v. Bateman*, 33 Ohio App. 66, 168 N.E. 574 (5th Dist. Muskingum County 1929); *Bradford v. Bradford*, 19 Ohio St. 546 (1869); *Modie v. Andrews*, 2002 WL 31386482 (Ohio App. 9 Dist. 2002); *but see* In re Stevens, 2012-Ohio-4754, 981 N.E.2d 905 ("In determining whether the in terrorem doctrine applies under a no-contest clause in a will courts must consider public policy, probable cause, good faith, and a variety of other matters in connection with the facts of the case.")			X	
Oklahoma	An attempt in good faith to probate a later purported will, spurious in fact, but believed to be genuine by one presenting it for probate, does not render offeror subject to forfeiture provisions of no-contest clauses if he/she has probable cause to believe that the instrument is genuine and entitled to probate. *Matter of Estate of Westfahl*, 1983 OK 119, 674 P.2d 21; *Calhoon v. Oakes*, 2016 OK CIV APP 61.	Such clauses are generally favored as a matter of public policy because they protect estates from costly, time consuming, and vexatious litigation, and minimize family bickering concerning the competence and capacity of the testator and the amounts bequeathed. For similar reasons, we find no contest clauses attached to trusts equally valid. In either instance, such clauses are strictly construed against forfeiture, and reasonably	X		X

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STATE	Wills	Trusts	Enforce (probable cause)	Enforce (regardless of probable cause or good faith)	Enforce (good faith)
		construed in favor of the beneficiary. *Barr v. Dawson*, 2007 OK CIV APP 38, ¶ 8, 158 P.3d 1073, 1075.			
Oregon	Enforceable even if probable cause, except the court shall not enforce an in terrorem clause: (a) if the devisee contesting the will establishes that: (A) The devisee has probable cause to believe that the will is a forgery; (B) the will has been revoked; or (C) the will is invalid in whole or in part, or (b) if the devisee is only making objections to the acts of the personal representative in the administration of the decedent's estate. Also not enforceable if the contest is brought by a fiduciary on behalf of a protected person, a guardian ad litem appointed for a minor or incapacitated person. "In terrorem clause" is defined as a provision in a will that reduces or eliminates a devise to a devisee if the devisee contests the will in whole or in part. The common law governs enforcement of an in terrorem clause to the extent the common law is not inconsistent with the provisions of this section. Or. Rev. Stat. Ann. § 112.272	Enforceable even if probable cause, except (a) if the beneficiary challenging the trust establishes that the beneficiary has probable cause to believe that the trust is a forgery or that the trust has been revoked; (b) if the challenge is brought by a fiduciary acting on behalf of a protected person, a guardian ad litem appointed for a minor or incapacitated person. "In terrorem clause" means a provision in a trust that reduces or eliminates the interest of a beneficiary under the trust if the beneficiary challenges the validity of part or all of the trust. Or. Rev. Stat. Ann. § 130.235		X	

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STATE	Wills	Trusts	Enforce (probable cause)	Enforce (regardless of probable cause or good faith)	Enforce (good faith)
Pennsylvania	A provision in a will or trust purporting to penalize an interested person for contesting the will or trust or instituting other proceedings relating to the estate or trust is unenforceable if probable cause exists for instituting proceedings. 20 Pa. Stat. and Cons. Stat. Ann. § 2521.	A provision in a will or trust purporting to penalize an interested person for contesting the will or trust or instituting other proceedings relating to the estate or trust is unenforceable if probable cause exists for instituting proceedings. 20 Pa. Stat. and Cons. Stat. Ann. § 2521.	X		
Rhode Island	Provision in will for forfeiture in event of contest by beneficiary is not contrary to public policy even though contest is made in good faith and on probable cause. *Elder v. Elder*, 84 R.I. 13, 120 A.2d 815 (1956).			X	
South Carolina	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. S.C. Code Ann. § 62-3-905		X		
South Dakota	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. S.D. Codified Laws § 29A-3-905.	A no contest clause is a provision or clause in a trust, that penalizes a qualified beneficiary for contesting a trust or instituting other proceedings at law or equity relating to the trust estate, excluding proceedings related to trust administration. A no contest clause shall be enforced unless probable cause exists for instituting the proceeding on the grounds of: (1) Fraud; (2) Duress; (3) Revocation; (4) Lack of contractual capacity; (5) Undue influence;	X		

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STATE	Wills	Trusts	Enforce (probable cause)	Enforce (regardless of probable cause or good faith)	Enforce (good faith)
		(6) Mistake; (7) Forgery; or (8) Irregularity in the execution of the trust document. S.D. Codified Laws § 55-1-46.			
Tennessee	Interest of legatee will not be forfeited under provision for forfeiture of interest of legatee who contests will, where contest was prosecuted in good faith and on probable cause. *Tate v. Camp*, 147 Tenn. 137, 245 S.W. 839 (1922); *Winningham v. Winningham*, 966 S.W.2d 48, 51 (1998).	Enforceable according to the express terms of the no-contest provision without regard to the beneficiary's good or bad faith in taking the action that would justify the complete or partial forfeiture of the beneficiary's interest in the trust under the terms of the no-contest provision unless probable cause exists for the beneficiary taking such action on the grounds of fraud, lack of capacity, mistake, and other challenges to document validity. Specifically excludes challenges to fiduciary conduct. Tenn. Code Ann. § 35-15-1014.	X - Wills	X - Trusts	X - Wills
Texas	Enforceable unless in a court action determining whether the forfeiture clause should be enforced, the person who brought the action contrary to the forfeiture clause establishes by a preponderance of the evidence that: (1) just cause existed for bringing the action; and (2) the action was brought and maintained in good faith. This section is not intended to and does not repeal any law recognizing that forfeiture clauses generally will not be construed to	A provision in a trust that would cause a forfeiture of or void an interest for bringing any court action, including contesting a trust, is enforceable unless in a court action determining whether the forfeiture clause should be enforced, the person who brought the action contrary to the forfeiture clause establishes by a preponderance of the evidence that:(1) just cause existed for bringing the action; and (2) the action was	X		

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STATE	Wills	Trusts	Enforce (probable cause)	Enforce (regardless of probable cause or good faith)	Enforce (good faith)
	prevent a beneficiary from seeking to compel a fiduciary to perform the fiduciary's duties, seeking redress against a fiduciary for a breach of the fiduciary's duties, or seeking a judicial construction of a will or trust. Tex. Est. Code Ann. § 254.005	brought and maintained in good faith. Tex. Prop. Code Ann. § 112.038			
Utah	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. Utah Code Ann. § 75-3-905		X		
Vermont			No case law or statute.		
Virginia	A no-contest provision in a will should be strictly enforced according to its terms. *Keener v. Keener*, 278 Va. 435, 442, 682 S.E.2d 545, 548 (2009).	Full effect to no-contest provisions in such trusts for the same reasons that support the enforcement of such provisions when they appear in wills. *Keener v. Keener*, 278 Va. 435, 442, 682 S.E.2d 545, 548 (2009).		X	
Washington	No contest clauses are valid and enforceable, unless the contest is brought in good faith and with probable cause. *In re Estate of Mumby*, 97 Wash. App. 385, 393, 982 P.2d 1219, 1224 (1999); *Boettcher v. Busse*, 45 Wash.2d 579, 585, 277 P.2d 368 (1954); *In re Estate of Chappell*, 127 Wash. 638, 221 P. 336 (1923)); *see also In re*	No contest clauses are valid and enforceable, unless the contest is brought in good faith and with probable cause. *In re Estate of Mumby*, 97 Wash. App. 385, 393, 982 P.2d 1219, 1224 (1999).	X		X

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STATE	Wills	Trusts	Enforce (probable cause)	Enforce (regardless of probable cause or good faith)	Enforce (good faith)
	Estate of Kubick, 9 Wash.App. 413, 419-20, 513 P.2d 76 (1973).				
West Virginia	Enforceable unless contest brought with "probabilis causa litigandi." *Dutterer v. Logan*, 103 W. Va. 216, 137 S.E. 1, 3 (1927)		X		
Wisconsin	A provision in a governing instrument that prescribes a penalty against an interested person for contesting the governing instrument or instituting other proceedings relating to the governing instrument may not be enforced if the court determines that the interested person had probable cause for instituting the proceedings. Wis. Stat. Ann. § 854.19		X		
Wyoming	Enforceable, regardless of whether contest was brought in good faith and with probable cause. *Dainton v. Watson*, 658 P.2d 79, 84 (Wyo. 1983).	Enforceable – *Briggs v. Wyoming Nat. Bank of Casper*, 836 P.2d 263, 266 (Wyo. 1992).		X	

APPENDIX D

50 STATE SURVEY OF STATE LAW ON INTENTIONAL INTERFERENCE WITH TESTAMENTARY EXPECTANCY

Appendix D:
50 State Survey of State Law on Intentional Interference with Testamentary Expectancy

STATE	Relevant Authority	Availability of Tort	Link to Will or Trust Contest
Alabama	The Alabama Supreme Court has consistently declined invitations to recognize a cause of action for tortious interference with an expectancy. *See Holt v. First Nat'l Bank of Mobile*, 418 So.2d 77, 81 (Ala.1982); *see also Ex parte Batchelor*, 803 So.2d 515, 519 (Ala.2001) (withdrawing an earlier opinion that recognized the tort).	No	N/A
Alaska		No case	N/A
Arizona		No case	N/A
Arkansas	Daughter of decedent, who unsuccessfully contested mother's will giving entire estate to son, had access to adequate remedy in probate court, and thus it was unnecessary to recognize cause of action for tortious interference with expected inheritance. *Jackson v. Kelly*, 345 Ark. 151, 44 S.W.3d 328 (2001)	No	N/A
California	Tort of intentional interference with an expected inheritance is recognized in California. *Beckwith v. Dahl*, 205 Cal. App. 4th 1039, 141 Cal. Rptr. 3d 142 (2012). The tort of IIEI is only available when the aggrieved party has essentially been deprived of access to the probate system. *Id.*	Yes	Yes
Colorado	*Lindberg v. U.S.*, 164 F.3d 1312, 99-1 U.S. Tax Cas. (CCH) P 60334, 83 A.F.T.R.2d 99-444 (10th Cir. 1999) (applying Colorado law; assuming for purposes of decision that Colorado courts would recognize the tort); *Schneider v. Cate*, 405 F. Supp. 2d 1254, 1263 (D. Colo. 2005) (While the Colorado Supreme Court has not ruled directly on this issue, the Tenth Circuit has interpreted Colorado law to recognize the claim of intentional interference with inheritance as a common law tort.); *McGregor v. McGregor*, 101 F. Supp. 848, 850 (D. Colo. 1951) aff'd, 201 F.2d 528 (10th Cir. 1953) (before the deprived legatee can seek relief in a tribunal other than the proper probate court, an attempt first must have been made to probate the will which is alleged to give rise to the claim, or that, in the alternative, it must be alleged and shown that such probate is impossible under the circumstances of the particular case.)	Yes	Yes
Connecticut	The appellate courts of Connecticut have not specifically discussed the elements necessary to establish a claim of tortious interference with an inheritance. However, this cause of action has been recognized by both this court and the Second Circuit as being available in Connecticut. *See, e.g., Devlin v. United States*, 352 F.3d 525, 540–42; *Caro v. Weintraub*, Civil No. 3:09–CV–1353 (PCD), 2010 WL 4514273 (D.Conn. Nov.2, 2010). *But see DiMaria v. Silvester*, 89 F.Supp.2d 195, 196 nn. 2–3 (D.Conn.1999) (stating without citation or explanation that Connecticut does not recognize a cause of action for "intentional interference with an inheritance"). *Kite v. Pascale*, No. 3:07-CV-0513 AWT, 2015 WL 1485022, at *10 (D. Conn. Mar. 31, 2015). For an unpublished recent opinion allowing the tort, *see* Wild v. Cocivera, No. HHDCV146050575S, 2016 WL 3912348, at *6 (Conn. Super. Ct. June 16, 2016).	Unclear	N/A

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STATE	Relevant Authority	Availability of Tort	Link to Will or Trust Contest
Delaware	To the extent that sister's action against her brother individually and as trustee of residuary trust created under will of their father for an accounting and a surcharge for loss and diminution of trust assets asserted a personal claim for interference with her prospective right to inherit from their mother, it failed to state a cause of action as to which equitable relief could be granted during the lifetime of the mother. *Chambers v. Kane*, 437 A.2d 163 (Del. 1981). We are not to be understood as implying that we believe that Delaware would, in no circumstances, allow an action for tortious interference with an inheritance. It is possible that if the tortfeasor himself was not a beneficiary of the will of the decedent or in privity with the beneficiary, such an action would be possible. . . . But where, as here, there was adequate relief available in a statutory proceeding, a tortious interference claim may not be pursued. *Moore v. Graybeal*, 843 F.2d 706, 711 (3d Cir. 1988)	Unclear	Yes
D.C.	*In re Estate of Reilly*, 933 A.2d 830, 834 (D.C. 2007) (granting summary judgment on the basis that the tort is not recognized), *but see Ingersoll Trust v. Ingersoll*, 950 A.2d 672, 699-700 (D.C. 2008) (assuming without deciding that the tort is recognized, though denying recovery)	Unclear	N/A
Florida	The alternative remedy available to the plaintiffs is an action for tortious interference with a testamentary expectancy. The Florida Supreme Court has said: 'Thus when the plaintiff is unable to establish a destroyed will in a probate proceeding because there was only one witness to that will, relief by an action in tort for malicious destruction is proper. The issue of what the destroyed will contained never was decided in the probate court and hence is not res judicata for purposes of the tort action. Recovery is allowed because of the equitable maxim that no wrong shall be without a remedy.... A pattern may be developed from this line of cases which allows the later action for tortious interference only if the circumstances surrounding the tortious conduct effectively preclude adequate relief in the probate court....' Cases which allow the action for tortious interference with a testamentary expectancy are predicated on the inadequacy of probate remedies, although this is not articulated." *In re Estate of Hatten*, 880 So. 2d 1271, 1275 (Fla. Dist. Ct. App. 2004) quoting *DeWitt v. Duce*, 408 So.2d at 219. *See also Henry v. Jones*, 202 So. 3d 129, 132 (Fla. Dist. Ct. App. 2016), *Ellis v. Warner*, No. 15-10134-CIV, 2017 WL 634287, at *18 (S.D. Fla. Feb. 16, 2017) (To state a claim for tortious interference with expectation of inheritance under Florida law, "a plaintiff must allege: (1) the existence of an expectancy; (2) intentional interference with the expectancy through tortious conduct; (3) causation; and (4) damages.").	Yes	Yes
Georgia	Almost 100 years ago, our Supreme Court set forth the elements of a cause of action based on tortious interference with an economic expectancy. *Ford v. Reynolds*, 315 Ga. App. 200, 202, 726 S.E.2d 687, 689 (2012) quoting *Mitchell v. Langley*, 143 Ga. 827, 835, 85 S.E. 1050 (1915).	Yes	No
Hawaii	*Foo v. Foo*, No. 24158, 2003 WL 220495, at *1 (Haw. Ct. App. Jan. 10, 2003) (unpublished opinion declining to recognize the tort because probate remedies were available.)	Unclear	N/A

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STATE	Relevant Authority	Availability of Tort	Link to Will or Trust Contest
Idaho	The definition of what acts by one who allegedly intentionally interferes with an expectancy are wrongful is a question of law for the court, rather than the jury. *Carter v. Carter*, 143 Idaho 373, 146 P.3d 639 (2006)	Yes	No
Illinois	In order to recover for malicious interference with expectancy, plaintiff must prove existence of expectancy, that defendants intentionally interfered with her expectancy, interference involved conduct tortious in itself such as fraud, duress or undue influence, that there is reasonable certainty that devised plaintiff would have been received but for defendant's interference and damages. *Nemeth v. Banhalmi*, 99 Ill. App. 3d 493, 425 N.E.2d 1187 (1981). The tort action will not lie, however, where the remedy of a will contest is available and would provide the injured party with adequate relief. *In re Estate of Hoover*, 160 Ill. App. 3d 964, 966, 513 N.E.2d 991, 992 (1987) *citing Robinson v. First State Bank of Monticello* (1983).	Yes	Yes
Indiana	A plaintiff must challenge tortious conduct surrounding the execution or revocation of a will in the will contest, but if the will contest does not provide an adequate remedy, only then can the plaintiff file an independent tort action for interference with an inheritance. *Keith v. Dooley*, 802 N.E.2d 54 (Ind. Ct. App. 2004)	Yes	Yes
Iowa	In *Frohwein v. Haesemeyer*, 264 N.W.2d 792 (Iowa 1978), we recognized a law action for tortious interference with a bequest. *Huffey v. Lea*, 491 N.W.2d 518, 520 (Iowa 1992); *see also In re Estate of Milton A. Boman*, No. 16-0110, 2017 WL 512493, at *8 (Iowa Ct. App. Feb. 8, 2017).	Yes	No
Kansas	The Kansas Supreme Court was directly confronted with the issue of whether Kansas recognized the tort of intentional interference with an inheritance in *Axe v. Wilson*, 150 Kan. 794, 96 P.2d 880, 881 (1939). After listing the conflicting cases on the question, the court specifically declined to decide the issue. However, the Court went on to hold that, under the circumstances of the case, plaintiff's remedy lay in her action to contest the will and not in an action for damages. *Maxwell v. Sw. Nat. Bank*, Wichita, Kan., 593 F. Supp. 250, 252-53 (D. Kan. 1984)	Unclear	N/A
Kentucky	We are impelled to the conclusion that the better rule, and the one supported by weight of authority, is that if a destroyed will can be probated, it should be, but if not, a tort action may be maintained. *Allen v. Lovell's Adm'x*, 303 Ky. 238, 243, 197 S.W.2d 424, 426 (1946)	Yes	Yes
Louisiana	*Kelly v. Kelly*, 10 La. Ann. 622 (1855) (cause of action was recognized where plaintiff alleged that the defendants prevented decedent, by threats and violence, from executing a will)	Yes	No
Maine	Independent cause of action for tortious interference with intended bequest is available when defendant tortiously prevents testator from making will favorable to plaintiff, prevents testator from revoking a will, tortiously causes testator to revoke or alter a will, or unlawfully causes testator to convey inter vivos that which would have passed under will. *Plimpton v. Gerrard*, 668 A.2d 882 (Me. 1995); *see also Cote v. Cote*, 2016 ME 94, ¶ 12, 143 A.3d 117, 121, as amended (Nov. 3, 2016).	Yes	No

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STATE	Relevant Authority	Availability of Tort	Link to Will or Trust Contest
Maryland	Synthesizing the above, we conclude that the Court of Appeals would recognize the tort if it were necessary to afford complete, but traditional, relief. In the case before us, no reason is given as to why recognition of the tort is necessary other than that damages are sought which are not otherwise available, specifically, damages for emotional distress, harm to reputation, and punitive damages. We decline to recognize the tort where the sole reason is an expansion of traditional remedies, as opposed to a situation, not before us, where the traditional remedy might be insufficient to correct the pecuniary loss. The question of viability and application of the tort depends on the facts in a given case. *Geduldig v. Posner*, 129 Md. App. 490, 508-09, 743 A.2d 247, 257 (1999)	Unclear	N/A
Massachusetts	For cause of action for tortious interference with expectancy of receiving a gift to exist, defendant must intentionally interfere with plaintiff's expectancy in unlawful way, plaintiff must have legally protected interest, and plaintiff must show that defendant's interference acted continuously on donor until the time the expectancy would have been realized. *Labonte v. Giordano*, 426 Mass. 319, 687 N.E.2d 1253 (1997); *see also Hanna v. Williams*, No. 1684CV0722BLS1, 2016 WL 8257509, at *5 (Mass. Super. Dec. 22, 2016).	Yes	Yes
Michigan	Action in tort to recover damages for malicious destruction of a will. *Creek v. Laski*, 248 Mich. 425, 227 N.W. 817 (1929)	Yes	Yes
Minnesota	Even if this court has the power to recognize the tort of interference with inheritance, we decline to do so in this case because the remedies available to appellant under the probate code are adequate to protect any interest he has in his father's estate. *Botcher v. Botcher*, No. CX-00-1287, 2001 WL 96147, at *2 (Minn. Ct. App. Feb. 6, 2001) (unpublished opinion)	Unclear	N/A
Mississippi		No case	N/A
Missouri	A claim for tortious interference with an inheritance lies where plaintiff could not discover the fraud until the probate period had run, where plaintiff was unable to establish a maliciously destroyed will, or where defendant tortiously induced an inter-vivos transfer of estate assets. *Gianella v. Gianella*, 234 S.W.3d 526 (Mo. Ct. App. 2007). While Missouri recognizes the tort of intentional interference with an inheritance expectancy, the tort is only available if the plaintiff first attempted to obtain a remedy in probate or is able to show the impossibility of obtaining an adequate remedy in such an action. *Id.*	Yes	Yes
Montana	Tortious interference with an expectancy in an inheritance or gift has not been recognized as a legal theory in Montana. *Hauck v. Seright*, 1998 MT 198, 290 Mont. 309, 964 P.2d 749	No	N/A
Nebraska	Nebraska does not recognize a cause of action for the tort of intentional interference with an inheritance. *Litherland v. Jurgens*, 291 Neb. 775, 869 N.W.2d 92 (2015)	No	N/A
Nevada	Tortious interference with expectancy of inheritance and promissory/tortious estoppel were not claims recognized under Nevada law. *Balestra-Leigh v. Balestra*, 471 F. App'x 636 (9th Cir. 2012)	Unclear	N/A
New Hampshire		No case	N/A

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STATE	Relevant Authority	Availability of Tort	Link to Will or Trust Contest
New Jersey	No New Jersey court has clearly recognized a cause of action for tortious interference with inheritance. Indeed, only a very few cases in the New Jersey state court system even mention the claim, and the New Jersey Supreme Court has never addressed the issue. However, the possibility of such a cause of action was first raised in an Appellate Division case in 1964 in *Casternovia v. Casternovia*, 197 A2d 406, 409 (N.J. Super. Ct. App. Div. 1964). *McDonald v. Copperthwaite*, No. CIV.A. 13-5559 FLW L, 2015 WL 519290, at *3 (D.N.J. Feb. 9, 2015)	Unclear	N/A
New Mexico	A claim of tortious interference with inheritance need only be established by a preponderance of the evidence. *Peralta v. Peralta*, 2006-NMCA-033, 139 N.M. 231, 131 P.3d 81; A cause of action for tortious interference with an expected inheritance will not lie when probate proceedings are available to address the disposition of disputed assets and can otherwise provide adequate relief. *Wilson v. Fritschy*, 2002-NMCA-105, 132 N.M. 785, 794, 55 P.3d 997, 1006.	Yes	Yes
New York	New York does not recognize right of action for tortious interference with prospective inheritance. *Vogt v. Witmeyer*, 87 N.Y.2d 998, 665 N.E.2d 189 (1996); *see also Knapp v. Maron*, No. 14-CV-10121 (NSR), 2016 WL 2851563, at *4 (S.D.N.Y. May 12, 2016).	No	N/A
North Carolina	North Carolina recognizes existence of tort of malicious and wrongful interference with making of a will. *Griffin v. Baucom*, 74 N.C. App. 282, 328 S.E.2d 38 (1985). While we agree that where a will has been submitted for probate, a plaintiff must avail himself of the statutory remedy of a will contest to prove or set aside the instrument, *see Johnson v. Stevenson*, 269 N.C. 200, 152 S.E.2d 214 (1967), where no will has been submitted, plaintiff may pursue a tort remedy and is not limited to the remedy of a probate proceeding. *Id.*	Yes	No
North Dakota		No case	N/A
Ohio	Ohio recognizes tort of intentional interference with expectancy of inheritance. *Firestone v. Galbreath*, 67 Ohio St. 3d 87, 616 N.E.2d 202 (1993); Plaintiff was required to apply Ohio law to exhaust probate remedies. *Firestone v. Galbreath*, 895 F. Supp. 917 (S.D. Ohio 1995); see also *Brown v. Ralston*, 2016-Ohio-4916, 67 N.E.3d 15.	Yes	Yes
Oklahoma	We conclude the trial court did not commit error in dismissing the claim for tortious interference with an inheritance because it is not a cognizable claim. We will not create or adopt this new tort. *Miller v. Johnson*, 2013 OK CIV APP 59, ¶ 14, 307 P.3d 387, 389, cert. denied (June 3, 2013).	No	N/A
Oregon	Tortious interference with prospective inheritance fits by logical extension within concept underlying tort of intentional interference with prospective economic advantage and may be deemed to be covered by that theory of recovery; such treatment would not run afoul of testamentary intent rule, or of Probate Code, since tort action is distinct from will contest. ORS 112.225 et seq. *Allen v. Hall*, 328 Or. 276, 974 P.2d 199 (1999); *see also* Grimstad v. Knudsen, 283 Or. App. 28, 386 P.3d 649 (2016).	Yes	No

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STATE	Relevant Authority	Availability of Tort	Link to Will or Trust Contest
Pennsylvania	The cause of action for wrongful interference with testamentary expectancies is limited to instances involving demonstrable interference with the testamentary scheme enshrined in a decedent's will. *Estate of Hollywood v. First Nat. Bank of Palmerton*, 2004 PA Super 321, 859 A.2d 472 (2004); but tort not available for trusts, *Steele v. First Nat. Bank of Mifflintown*, 963 F. Supp. 2d 417, 426 (M.D. Pa. 2013).	Yes	No
Rhode Island	Under Rhode Island law, a cause of action for tortious interference with an expectancy of inheritance, if it lies at all, would not lie where an adequate statutory remedy is available but has not been pursued. *Umsted v. Umsted*, 446 F.3d 17 (1st Cir. 2006)	Unclear	N/A
South Carolina	Under South Carolina law, as predicted by the district court, the tort of intentional interference with inheritance is a valid cause of action. *Wellin v. Wellin*, 135 F. Supp. 3d 502 (D.S.C. 2015). South Carolina courts would not permit plaintiffs to bring a cause of action for intentional interference with inheritance where an adequate remedy exists at probate. *Id.*	Yes	Yes
South Dakota		No case	N/A
Tennessee	We decline to use this case to determine whether Tennessee should adopt the tort of interference with inheritance or gift. *Fell v. Rambo*, 36 S.W.3d 837, 850 (Tenn. Ct. App. 2000); Tennessee does not, however, recognize that tortious cause of action. *Stewart v. Sewell*, 215 S.W.3d 815, 827 (Tenn. 2007) (but cites to *Fell v. Rambo*, which declined to decide whether TN should adopt the tort).	Unclear	N/A
Texas	Cause of action exists under Texas law for tortious interference with inheritance rights. *King v. Acker*, 725 S.W.2d 750 (Tex. App. 1987); *but see Anderson v. Archer*, 490 S.W.3d 175, 176 (Tex. App. 2016) (this Court has never purported to hold that a tortious-interference-with-inheritance tort has been or should be recognized in Texas law). Also, Tex. Est. Code Ann. § 54.001 provides that "[t]he filing or contesting in probate court of a pleading relating to a decedent's estate does not constitute tortious interference with inheritance of the estate."	Unclear	N/A
Utah		No case	N/A
Vermont	Heirs of *Adams v. Adams*, 22 Vt. 50, 59 (1849) ("In the case of *Mead et al. v. Heirs of Langdon*, decided in Washington County in 1834, and never reported, this court set up and decreed the payment of legacies, given in a will never proved in the probate court, but which had been suppressed by those interested in the estate and administration obtained without regard to the will. This decision went mainly upon the ground, perhaps, of the destruction of the will, and the consequent difficulty with regard to proper parties in any proceeding at law, inasmuch as the legatees were not among the legal heirs .... [and] upon the ground merely of aiding the jurisdiction of the probate court in those points only, wherein its functions and powers are inadequate to the purposes of perfect justice, in the same degree, and for the same reason, that it interferes in other cases, where the principal jurisdiction is in the courts of common law.").	Yes	Yes

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STATE	Relevant Authority	Availability of Tort	Link to Will or Trust Contest
Virginia	A cause of action for "tortious interference with inheritance" is not recognized in Virginia. *Economopoulos v. Kolaitis*, 259 Va. 806, 528 S.E.2d 714 (2000)	No	N/A
Washington	Two published Washington cases have considered this tort, but neither adopted it – *Hadley v. Cowan*, 60 Wash.App. 433, 436, 804 P.2d 1271 (1991) and *Grange Insurance Association v. Roberts*, 179 Wash.App. 739, 760–61, 320 P.3d 77 (2013). Both *Hadley* and *Grange Insurance* avoided the issue of whether Washington should adopt the tort of interference with an inheritance expectancy. *In re Estate of Lowe*, 361 P.3d 789, 799 (Wash. Ct. App. 2015)	Unclear	N/A
West Virginia	An intended beneficiary may sue for tortious interference with testamentary bequest. *Barone v. Barone*, 170 W. Va. 407, 294 S.E.2d 260 (1982)	Yes	No
Wisconsin	One who by fraud, duress, or other tortious means intentionally prevents another from receiving from third person inheritance or gift that he would otherwise have received is subject to liability to other for loss of inheritance or gift; Restatement (Second) of Torts § 774B is adopted. *Harris v. Kritzik*, 166 Wis. 2d 689, 480 N.W.2d 514 (Ct. App. 1992)	Yes	No
Wyoming	This is not a tort which has been recognized in Wyoming. *Spear v. Nicholson*, 882 P.2d 1237 (Wyo. 1994). The cause of action might be appropriate in some circumstances, as in the *Spear* case, where the contestants had filed a claim in the probate action. If a probate court determined that there was undue influence, then it might follow that the responsible party could be held to answer in a tort action. *Kibbee v. First Interstate Bank*, 2010 WY 143, 242 P.3d 973 (Wyo. 2010)	Unclear	N/A

APPENDIX E

50 STATE SURVEY OF STATUTORY CARVE OUTS FOR DECANTING, NJSAS, AND TOTAL RETURN TRUST CONVERSION

Appendix E:
50 State Survey of Statutory Carve Outs for Decanting, NJSAs, and Total Return Trust Conversion

STATE	Decanting Carve Out	NJSA Carve Out	Unitrust Carve Out	Decanting Opt Out Method	NJSA Opt Out Method	Unitrust Opt Out Method
Alabama		Ala. Code § 19-3B-111 (Nonjudicial settlement agreements); "The terms of a trust prevail over any provision of this chapter [except a list, NJSAs not included]." Ala. Code § 19-3B-105(b)	Unless expressly prohibited by the governing instrument a trustee may convert a trust into a unitrust as described in this section... Ala. Code § 19-3A-106		Terms of trust prevail	Expressly prohibit in trust instrument
Alaska	The application provisions of (e) of this section do not apply if (1) the terms of the trust, including the terms as amended, expressly provide that this section does not apply and either specifically refer to this section or otherwise clearly demonstrate the intent that this section does not apply; or (2) the trust is irrevocable and all parties in interest elect under (g) of this section not to be subject to the application of this section;		Unless expressly prohibited by the governing instrument, a trustee may release the power to adjust under AS 13.38.210 and may convert a trust into a unitrust... Alaska Stat. Ann. § 13.38.300	Specific reference to statute		Expressly prohibit in trust instrument

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STATE	Decanting Carve Out	NJSA Carve Out	Unitrust Carve Out	Decanting Opt Out Method	NJSA Opt Out Method	Unitrust Opt Out Method
	an election under this paragraph must be made on or before January 1, 2003, or three years after the date on which the trust becomes irrevocable, whichever date is later; however, notwithstanding AS 13.36.080, the trustee does not have a duty to inform the parties in interest of this election. Alaska Stat. Ann. § 13.36.153(f)					
Arizona	Ariz. Rev. Stat. Ann. § 14-10819	Ariz. Rev. Stat. Ann. § 14-10105 (Nonjudicial settlement agreements); "The terms of a trust prevail over any provision of this chapter [except a list, NJSAs not included]." Ariz. Rev. Stat. Ann. § 14-10111	The governing instrument expressly prohibits use of this section by specific reference to this section or expressly states the settlor's intent that net income not be calculated as a unitrust amount. A provision in the governing instrument that "the provisions of Arizona	Expressly prohibit in trust instrument	Expressly prohibit in trust instrument	Specific reference to statute or expressly prohibit in trust instrument

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STATE	Decanting Carve Out	NJSA Carve Out	Unitrust Carve Out	Decanting Opt Out Method	NJSA Opt Out Method	Unitrust Opt Out Method
			Revised Statutes, § 14-11014, as amended, or any correspondi ng provision of future law, shall not be used in the administrati on of this trust" or "my trustee shall not determine the distributions to the income beneficiary as a unitrust amount" or similar words reflecting such intent shall be sufficient to preclude the use of this section. Ariz. Rev. Stat. Ann. § 14-11014			
Arkansas		Ark. Code Ann. § 28-73-411 (Nonjudicial settlement agreements); "The terms of a trust prevail over any provision of this chapter [except a list, NJSAs not included]." Ark. Code Ann. § 28-73-105			Terms of trust prevail	

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50 State Survey of Statutory Carve Outs for Decanting, NJSAs, and Total Return Trust Conversion

STATE	Decanting Carve Out	NJSA Carve Out	Unitrust Carve Out	Decanting Opt Out Method	NJSA Opt Out Method	Unitrust Opt Out Method
California			Unless expressly prohibited by the governing instrument, a trustee may convert a trust into a unitrust… Cal. Prob. Code § 16336.4			Expressly prohibit in trust instrument
Colorado	An authorized fiduciary may not exercise the decanting power to the extent the first-trust instrument expressly prohibits exercise of: (a) The decanting power; or (b) A power granted by state law to the fiduciary to distribute part or all of the principal of the trust to another trust or to modify the trust. Colo. Rev. Stat. Ann. § 15-16-915		Unless expressly prohibited by the governing instrument, a trustee may release the power to adjust described in section 15-1-404 and convert a trust to a unitrust… Colo. Rev. Stat. Ann. § 15-1-404.5	Expressly prohibit in trust instrument		Expressly prohibit in trust instrument
Connecticut						

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50 State Survey of Statutory Carve Outs for Decanting, NJSAs, and Total Return Trust Conversion

STATE	Decanting Carve Out	NJSA Carve Out	Unitrust Carve Out	Decanting Opt Out Method	NJSA Opt Out Method	Unitrust Opt Out Method
Delaware	Del. Code Ann. tit. 12, § 3528		The governing instrument expressly prohibits use of this section by specific reference to the section or expressly states the trustor's intent that net income not be calculated as a unitrust amount. A provision in the governing instrument that "The provisions of 12 Del. C. § 61-106, as amended, or any correspondi ng provision of future law, shall not be used in the administrati on of this trust." or "My trustee shall not determine the distributions to the income beneficiary as a unitrust amount." or similar words reflecting such intent shall be sufficient to	Expressly prohibit in trust instrument		Specific reference to statute or expressly prohibit in trust instrument

Appendix E:
50 State Survey of Statutory Carve Outs for Decanting, NJSAs, and Total Return Trust Conversion

STATE	Decanting Carve Out	NJSA Carve Out	Unitrust Carve Out	Decanting Opt Out Method	NJSA Opt Out Method	Unitrust Opt Out Method
			preclude the use of this section. Del. Code Ann. tit. 12, § 61-106			
D.C.		D.C. Code Ann. § 19-1301.11 (Nonjudicial settlement agreements); "The terms of a trust prevail over any provision of this chapter [except a list, NJSAs not included]." D.C. Code Ann. § 19-1301.05			Terms of trust prevail	
Florida	FLA. STAT. § 736.04117	Fla. Stat. Ann. § 736.0111 (Nonjudicial settlement agreements); "The terms of a trust prevail over any provision of this code [except a list, NJSAs not included]." Fla. Stat. Ann. § 736.0105	The governing instrument expressly prohibits use of this section by specific reference to the section. A provision in the governing instrument that, "The provisions	Expressly prohibit in trust instrument	Terms of trust prevail	Specific reference to statute

Appendix E:
50 State Survey of Statutory Carve Outs for Decanting, NJSAs, and Total Return Trust Conversion

STATE	Decanting Carve Out	NJSA Carve Out	Unitrust Carve Out	Decanting Opt Out Method	NJSA Opt Out Method	Unitrust Opt Out Method
			of section 738.1041, Florida Statutes, as amended, or any correspondi ng provision of future law, may not be used in the administrati on of this trust," or similar words reflecting such intent are sufficient to preclude the use of this section. Fla. Stat. Ann. § 738.1041			
Georgia			Unless expressly prohibited by the trust instrument, a trustee may release the power to adjust under Code Section 53-12-361 and convert a trust into a unitrust… Ga. Code Ann. § 53-12-362			Expressly prohibit in trust instrument
Hawaii						
Idaho		Idaho Code Ann. § 15-8-302				

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50 State Survey of Statutory Carve Outs for Decanting, NJSAs, and Total Return Trust Conversion

STATE	Decanting Carve Out	NJSA Carve Out	Unitrust Carve Out	Decanting Opt Out Method	NJSA Opt Out Method	Unitrust Opt Out Method
Illinois	This Section shall be construed as pertaining to the administration of a trust and shall be available to any trust that is administered in Illinois under Illinois law or that is governed by Illinois law with respect to the meaning and effect of its terms, including a trust whose governing law has been changed to the laws of this State, unless the governing instrument expressly prohibits use of this Section by specific reference to this Section. A provision in the governing instrument in the form: "Neither the provisions of Section 16.4 of the Trusts and Trustees Act nor any corresponding provision of future law may be used	This Section shall be construed as pertaining to the administration of a trust and shall be available to any trust that is administered in this State or that is governed by Illinois law with respect to the meaning and effect of its terms, except to the extent the governing instrument expressly prohibits the use of this Section by specific reference to this Section. A provision in the governing instrument in the form: "Neither the provisions of Section 16.1 of the Illinois Trusts and Trustees Act nor any corresponding provision of future law may be used in the administration of this trust", or a similar provision demonstrating that intent, is sufficient to	The governing instrument expressly prohibits use of this Section by specific reference to this Section. A provision in the governing instrument in the form: "Neither the provisions of Section 5.3 of the Trusts and Trustees Act nor any correspondi ng provision of future law may be used in the administrati on of this trust" or a similar provision demonstrati ng that intent is sufficient to preclude the use of this Section. 760 Ill. Comp. Stat. Ann. 5/5.3	Specific reference to statute	Specific reference to statute	Specific reference statute

Appendix E:
50 State Survey of Statutory Carve Outs for Decanting, NJSAs, and Total Return Trust Conversion

STATE	Decanting Carve Out	NJSA Carve Out	Unitrust Carve Out	Decanting Opt Out Method	NJSA Opt Out Method	Unitrust Opt Out Method
	in the administration of this trust" or a similar provision demonstrating that intent is sufficient to preclude the use of this Section. 760 Ill. Comp. Stat. Ann. 5/16.4	preclude the use of this Section. 760 Ill. Comp. Stat. Ann. 5/16.1(f)				
Indiana	Ind. Code Ann. § 30-4-3-36		Unless expressly prohibited in the governing trust instrument, and if the trustee would not be prohibited from exercising the power to adjust under IC 30-2-14-15(a) because at least one (1) of the provisions of IC 30-2-14-15(c)(3) through IC 30-2-14-15(c)(7)	Expressly prohibit in trust instrument		Expressly prohibit in trust instrument

Appendix E:
50 State Survey of Statutory Carve Outs for Decanting, NJSAs, and Total Return Trust Conversion

STATE	Decanting Carve Out	NJSA Carve Out	Unitrust Carve Out	Decanting Opt Out Method	NJSA Opt Out Method	Unitrust Opt Out Method
			would be applicable, a trustee may, without the approval of the court having jurisdiction of the trust, [convert an income trust to a unitrust]. Ind. Code Ann. § 30-2-15-10			
Iowa		Iowa Code Ann. § 633A.6308 (Nonjudicial settlement agreements); The terms of a trust shall always control and take precedence over any section of this trust code to the contrary. If a term of the trust modifies or makes any section of this trust code inapplicable to the trust, the common law shall apply to any issues raised by such term. Iowa Code Ann. § 633A.1105	The governing instrument expressly prohibits use of this subchapter by specific reference to the subchapter. A provision in the governing instrument that the provisions of sections 637.601 through 637.615 or any correspondi ng provision of future law shall not be used in the administrati on of this trust or similar words reflecting such intent shall be sufficient to preclude the		Trust terms control	Specific reference to statute

Appendix E:
50 State Survey of Statutory Carve Outs for Decanting, NJSAs, and Total Return Trust Conversion

STATE	Decanting Carve Out	NJSA Carve Out	Unitrust Carve Out	Decanting Opt Out Method	NJSA Opt Out Method	Unitrust Opt Out Method
			use of this subchapter. Iowa Code Ann. § 637.613			
Kansas		Kan. Stat. Ann. § 58a-111 (Nonjudicial settlement agreements); "The terms of a trust prevail over any provision of this code [except a list, NJSAs not included]." Kan. Stat. Ann. § 58a-105	Unless expressly prohibited by the governing instrument, a trustee may release the power under K.S.A. 58-9-104, and amendments thereto, and convert a trust into a unitrust . . . Kan. Stat. Ann. § 58-9-105		Terms of trust prevail	Expressly prohibit in trust instrument
Kentucky	Ky. Rev. Stat. Ann. § 386.175	Ky. Rev. Stat. Ann. § 386B.1-090 (Nonjudicial settlement agreements); "The terms of a trust prevail over any provision of this chapter [except a list, NJSAs not included]." Ky. Rev. Stat. Ann. § 386B.1-030	Unless expressly prohibited by the terms of a trust, a fiduciary may release the power to make adjustments under subsection (1) of this section and convert to a unitrust… Ky. Rev.	None		Expressly prohibit in trust instrument

Appendix E:
50 State Survey of Statutory Carve Outs for Decanting, NJSAs, and Total Return Trust Conversion

STATE	Decanting Carve Out	NJSA Carve Out	Unitrust Carve Out	Decanting Opt Out Method	NJSA Opt Out Method	Unitrust Opt Out Method
			Stat. Ann. § 386.454			
Louisiana						
Maine		Me. Rev. Stat. Ann. tit. 18-B § 111 (Nonjudicial settlement agreements); "The terms of a trust prevail over any provision of this Code [except a list, NJSAs not included]." Me. Rev. Stat. tit. 18-B, § 105	Unless expressly prohibited by the terms of the trust, a trustee may release the power to adjust under section 7-704 and convert a trust into a unitrust… Me. Rev. Stat. tit. 18-A, § 7-705		Terms of trust prevail	Expressly prohibit in trust instrument
Maryland		Md. Code Ann., Est. & Trusts § 14.5-105 (Nonjudicial settlement agreements); "The terms of a trust prevail over a provision of this title [except a list, NJSAs not included]." Md. Code Ann., Est. & Trusts § 14.5-111	Unless it is clear from the terms of the trust that the terms are intended to deny the trustee the power conferred by subsection (a) of this section, the terms of a trust that limit the power of a trustee to convert to a unitrust do not affect the application of this section. Md. Code Ann., Est. & Trusts § 15-		Terms of trust prevail	Expressly prohibit in trust instrument

Appendix E:
50 State Survey of Statutory Carve Outs for Decanting, NJSAs, and Total Return Trust Conversion

STATE	Decanting Carve Out	NJSA Carve Out	Unitrust Carve Out	Decanting Opt Out Method	NJSA Opt Out Method	Unitrust Opt Out Method
			502.1			
Massachusetts		Mass. Gen. Laws Ann. ch. 203E, § 111 (Nonjudicial settlement agreements); "The terms of a trust prevail over any provision of this chapter [except a list, NJSAs not included]." Mass. Gen. Laws Ann. ch. 203E, § 105			Terms of trust prevail	
Michigan	Mich. Comp. Laws § 700.7820a; MICH. COMP. LAWS § 556.115A (power of appointment)	Mich. Comp. Laws Ann. § 700.7111 (Nonjudicial settlement agreements); "The terms of a trust prevail over any provision of this article [except a list, NJSAs not included]." Mich. Comp. Laws Ann. § 700.7105.		Expressly prohibit in trust instrument	Terms of trust prevail	
Minnesota	Unless the invaded trust expressly provides otherwise, this section applies to any trust governed by the laws of this state, including a trust whose governing law has been changed to the laws of this state.	Minn. Stat. Ann. § 501C.0111 (Nonjudicial settlement agreements); "The terms of a trust prevail over any provision of this chapter [except a list, NJSAs not included]." Minn. Stat. Ann. § 501C.0105		Expressly prohibit in trust instrument	Terms of trust prevail	

Appendix E:
50 State Survey of Statutory Carve Outs for Decanting, NJSAs, and Total Return Trust Conversion

STATE	Decanting Carve Out	NJSA Carve Out	Unitrust Carve Out	Decanting Opt Out Method	NJSA Opt Out Method	Unitrust Opt Out Method
	Minn. Stat. Ann. § 502.851					
Mississippi		Miss. Code. Ann. § 91-8-111 (Nonjudicial settlement agreements); "The terms of a trust prevail over any provision of this chapter [except a list, NJSAs not included]." Miss. Code. Ann. § 91-8-105			Terms of trust prevail	
Missouri	Mo. Rev. Stat. § 456.4-419	Mo. Rev. Stat. § 456.1-111 (Nonjudicial settlement agreements); "The terms of a trust prevail over any provision of sections 456.1-101 to 456.11-1106 [except a list, NJSAs not included]." Mo. Ann. Stat. § 456.1-105	Any trust created under an instrument that became irrevocable on, before, or after August 28, 2001, if the trustee, in the trustee's discretion, elects to have this section apply unless the instrument creating the trust specifically prohibits an election under this subdivision. Mo. Ann. Stat. § 469.411	Expressly prohibit in trust instrument	Terms of trust prevail	Specific reference to statute

Appendix E:
50 State Survey of Statutory Carve Outs for Decanting, NJSAs, and Total Return Trust Conversion

STATE	Decanting Carve Out	NJSA Carve Out	Unitrust Carve Out	Decanting Opt Out Method	NJSA Opt Out Method	Unitrust Opt Out Method
Montana		Mont. Code Ann. § 72-38-111 (Nonjudicial settlement agreements); "The terms of a trust prevail over any provision of this chapter [except a list, NJSAs not included]." Mont. Code Ann. § 72-38-105			Terms of trust prevail	
Nebraska		Neb. Rev. Stat. § 30-3811 (Nonjudicial settlement agreements); "The terms of a trust prevail over any provision of the code [except a list, NJSAs not included]." Neb. Rev. Stat. Ann. § 30-3805	Unless expressly prohibited by a trust, a trustee may release the power to adjust described in section 30-3119 and convert a trust to a total return trust. Neb. Rev. Stat. Ann. § 30-3119.01		Terms of trust prevail	Expressly prohibit in trust instrument
Nevada	Nev. Rev. Stat. Ann. § 163.556		Unless expressly prohibited by the trust instrument, a trustee may convert a trust into a unitrust… Nev. Rev. Stat. Ann. § 164.796	Expressly prohibit in trust instrument		Expressly prohibit in trust instrument
New Hampshire	A trustee's power to decant may be expanded, restricted, eliminated, or otherwise	N.H. Rev. Stat. Ann. § 564-B:1-111(Nonjudicial settlement agreements); "The terms of	Unless expressly prohibited by the terms of the trust, a trustee may convert	Terms of trust prevail	Terms of trust prevail	Expressly prohibit in trust instrument

Appendix E:
50 State Survey of Statutory Carve Outs for Decanting, NJSAs, and Total Return Trust Conversion

STATE	Decanting Carve Out	NJSA Carve Out	Unitrust Carve Out	Decanting Opt Out Method	NJSA Opt Out Method	Unitrust Opt Out Method
	altered by the terms of the trust. N.H. Rev. Stat. Ann. § 564-B:4-418(n) (decanting statute); A trustee's power of modification under this section may be expanded, restricted, eliminated, or otherwise altered by the terms of the trust. N.H. Rev. Stat. Ann. § 564-B:4-419(i) (trustee's power of modification)	a trust prevail over any provision of the chapter [except a list, NJSAs not included]." N.H. Rev. Stat. Ann. § 564-B:1-105	a trust into a unitrust… N.H. Rev. Stat. Ann. § 564-C:1-106			
New Jersey		N.J. Stat. Ann. § 3B:31-11 (Nonjudicial settlement agreements); "The terms of a trust prevail over any provision of this chapter [except a list, NJSAs not included]." N.J. Stat. Ann. § 3B:31-5				
New Mexico	An authorized fiduciary shall not exercise the decanting power to the extent that the first-trust instrument expressly prohibits	N.M. Stat. Ann. § 46A-1-111 (Nonjudicial settlement agreements); "The terms of a trust prevail over any provision of the Uniform	Unless expressly prohibited by the governing instrument, a trustee may release the power to adjust as provided in	Expressly prohibit in trust instrument	Terms of trust prevail	Expressly prohibit in trust instrument

Appendix E:
50 State Survey of Statutory Carve Outs for Decanting, NJSAs, and Total Return Trust Conversion

STATE	Decanting Carve Out	NJSA Carve Out	Unitrust Carve Out	Decanting Opt Out Method	NJSA Opt Out Method	Unitrust Opt Out Method
	exercise of: (1) the decanting power; or (2) a power granted by state law to the fiduciary to distribute part or all of the principal of the trust to another trust. N.M. Stat. Ann. § 46-12-115	Trust Code [except a list, NJSAs not included]." N.M. Stat. Ann. § 46A-1-105	Section 46-3A-104 NMSA 1978 or convert a trust to a total return trust… N.M. Stat. Ann. § 46-3A-105			
New York	N.Y. Est. Powers & Trusts Law § 10-6.6(r)	NJSA only for settling of account. N.Y. Surr. Ct. Proc. Act Law § 315(8)	This section shall not apply to a trust if the governing instrument provides in substance that this section shall not apply. N.Y. Est. Powers & Trusts Law § 11-2.4	Expressly prohibit in trust instrument	Expressly prohibit in trust instrument	Expressly prohibit in trust instrument
North Carolina	N.C. Gen. Stat. Ann. § 36C-8-816.1	N.C. Gen. Stat. Ann. § 36C-1-105	This Part shall apply to all trusts in existence on, or created after January 1, 2004, unless … the governing instrument expressly prohibits use of this Part by specific reference to this Part, or expressly states the settlor's intent that net income not be	None	Terms of trust prevail	Expressly prohibit in trust instrument

Appendix E:
50 State Survey of Statutory Carve Outs for Decanting, NJSAs, and Total Return Trust Conversion

STATE	Decanting Carve Out	NJSA Carve Out	Unitrust Carve Out	Decanting Opt Out Method	NJSA Opt Out Method	Unitrust Opt Out Method
			calculated as a unitrust amount. N.C. Gen. Stat. Ann. § 37A-1-104.9			
North Dakota		N.D. Cent. Code § 59-09-11 (Nonjudicial settlement agreements); "The terms of a trust prevail over any provision of this title [except a list, NJSAs not included]." N.D. Cent. Code Ann. § 59-09-05 (West)			Terms of trust prevail	
Ohio	Ohio Rev. Code Ann. § 5808.18	Ohio Rev. Code Ann. § 5801.10 (Nonjudicial settlement agreements); "The terms of a trust prevail over any provision of Chapters 5801. to 5811. of the Revised Code [except a list, NJSAs not included]." Ohio Rev. Code Ann. § 5801.04		Expressly prohibit in trust instrument	Terms of trust prevail	
Oklahoma						
Oregon		Or. Rev. Stat. § 130.045 (Nonjudicial settlement agreements); "The terms of a trust prevail over any provision of	Unless expressly prohibited by the terms of the trust, a trustee may release the power to make		Terms of trust prevail	Expressly prohibit in trust instrument

Appendix E:
50 State Survey of Statutory Carve Outs for Decanting, NJSAs, and Total Return Trust Conversion

STATE	Decanting Carve Out	NJSA Carve Out	Unitrust Carve Out	Decanting Opt Out Method	NJSA Opt Out Method	Unitrust Opt Out Method
		this chapter [except a list, NJSAs not included]." Or. Rev. Stat. Ann. § 130.020	adjustments under ORS 129.215 (1) and convert a trust into a unitrust… Or. Rev. Stat. Ann. § 129.225			
Pennsylvania		20 Pa.C.S.A. § 7710.1 (Nonjudicial settlement agreements); "Except as provided in subsection (b), the provisions of a trust instrument prevail over any contrary provisions of this chapter." 20 Pa. Stat. and Cons. Stat. Ann. § 7705	Unless expressly prohibited by the governing instrument, a trustee may release the power under section 8104 (relating to trustee's power to adjust) and convert a trust into a unitrust… 20 Pa. Stat. and Cons. Stat. Ann. § 8105		Terms of trust prevail	Expressly prohibit in trust instrument
Rhode Island	18 R.I. Gen. Laws Ann. § 18-4-31			Expressly prohibit in trust instrument		
South Carolina	S.C. Code Ann. § 62-7-816A	S.C. Code Ann. § 62-7-111 (Nonjudicial settlement agreements); "The terms of a trust prevail over any provision of this article [except a list, NJSAs not included]." S.C. Code Ann. § 62-7-	The governing instrument expressly prohibits use of Sections 62-7-904B through 62-7-904P by specific reference to Sections 62-7-904B through 62-7-904P or expressly	Expressly prohibit in trust instrument	Terms of trust prevail	Expressly prohibit in trust instrument

Appendix E:
50 State Survey of Statutory Carve Outs for Decanting, NJSAs, and Total Return Trust Conversion

STATE	Decanting Carve Out	NJSA Carve Out	Unitrust Carve Out	Decanting Opt Out Method	NJSA Opt Out Method	Unitrust Opt Out Method
		105	states the settlor's intent that net income not be calculated as a unitrust amount. S.C. Code Ann. § 62-7-904I			
South Dakota	S.D. Codified Laws §§ 55-2-15 to 55-2-21		This chapter shall be construed as pertaining to the administration of a trust and shall be available to any trust that is administered in South Dakota under South Dakota law unless ... the governing instrument expressly prohibits use of this chapter by specific reference to the chapter. S.D. Codified Laws § 55-15-12	Expressly prohibit in trust instrument		Specific reference to statute
Tennessee	Tenn. Code Ann. § 35-15-816(b)(27)	Tenn. Code Ann. § 35-15-111(Nonjudicial settlement agreements); "The terms of a trust prevail over any provision of this chapter [except a list, NJSAs not included]."	The governing instrument expressly prohibits use of this section by specific reference to the section or expressly states the trustor's	Expressly prohibit in trust instrument	Terms of trust prevail	Expressly prohibit in trust instrument

Appendix E:
50 State Survey of Statutory Carve Outs for Decanting, NJSAs, and Total Return Trust Conversion

STATE	Decanting Carve Out	NJSA Carve Out	Unitrust Carve Out	Decanting Opt Out Method	NJSA Opt Out Method	Unitrust Opt Out Method
		Tenn. Code Ann. § 35-15-105	intent that net income not be calculated as a unitrust amount. Tenn. Code Ann. § 35-6-108			
Texas	An authorized trustee may not exercise a power to distribute principal of a trust otherwise provided by Section 112.072 or 112. 073 if the distribution is expressly prohibited by the terms of the governing instrument of the trust. Tex. Prop. Code Ann. § 112.084			Expressly prohibit in trust instrument		
Utah		Utah Code Ann. § 75-7-110 (Nonjudicial settlement agreements); "Except as specifically provided in this chapter, the terms of a trust prevail over any provision of this chapter [except a list, NJSAs not included]." Utah Code Ann. § 75-7-105	This chapter applies to every trust or decedent's estate existing on July 1, 2013, or created afterward, except as otherwise expressly provided in the will or terms of the trust or in this chapter. Utah Code Ann. § 22-7-117		Terms of trust prevail	Expressly prohibit in trust instrument

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50 State Survey of Statutory Carve Outs for Decanting, NJSAs, and Total Return Trust Conversion

STATE	Decanting Carve Out	NJSA Carve Out	Unitrust Carve Out	Decanting Opt Out Method	NJSA Opt Out Method	Unitrust Opt Out Method
Vermont		Vt. Stat. Ann. tit. 14A § 111 (Nonjudicial settlement agreements); "The terms of a trust prevail over any provision of this title [except a list, NJSAs not included]." Vt. Stat. Ann. tit. 14A, § 105.	The governing instrument expressly prohibits use of this section by specific reference to the section or expressly states the settlor's intent that net income not be calculated as a unitrust amount. A provision in the governing instrument that "The provisions of section 907 of this title, as amended, or any correspondi ng provision of future law, shall not be used in the administrati on of this trust" or "My trustee shall not determine the distributions to the income beneficiary as a unitrust amount" or similar words reflecting such intent shall be		Terms of trust prevail	Specific reference to statute or expressly prohibit in trust instrument

Appendix E:
50 State Survey of Statutory Carve Outs for Decanting, NJSAs, and Total Return Trust Conversion

STATE	Decanting Carve Out	NJSA Carve Out	Unitrust Carve Out	Decanting Opt Out Method	NJSA Opt Out Method	Unitrust Opt Out Method
			sufficient to preclude the use of this section. Vt. Stat. Ann. tit. 14A, § 907			
Virginia	...unless the governing instrument expressly prohibits the exercise of the power under this section. A provision in the governing instrument that "The provisions of § 64.2-778.1, Code of Virginia, as amended, or any corresponding provision of future law, shall not be used in the administration of this trust" or "My trustee shall not have the power to appoint the income or	Va. Code Ann. § 64.2-709 (Nonjudicial settlement agreements); "The terms of a trust prevail over any provision of this chapter [except a list, NJSAs not included]." Va. Code Ann. § 64.2-703	The governing instrument expressly prohibits use of this section by specific reference to this section or expressly reflects the grantor's intent that net income not be calculated as a unitrust amount. A provision in the governing instrument that "The provisions of § 64.2-1003, Code of Virginia, as amended, or any correspondi ng provision	Expressly prohibit in trust instrument	Terms of trust prevail	Specific reference to statute or expressly prohibit in trust instrument

Appendix E:
50 State Survey of Statutory Carve Outs for Decanting, NJSAs, and Total Return Trust Conversion

STATE	Decanting Carve Out	NJSA Carve Out	Unitrust Carve Out	Decanting Opt Out Method	NJSA Opt Out Method	Unitrust Opt Out Method
	principal of this trust to another trust" or similar words reflecting such intent shall be sufficient to preclude the application of this section. Va. Code Ann. § 64.2-778.1		of future law, shall not be used in the administration of this trust," or "My trustee shall not determine the distributions to the income beneficiary as a unitrust amount," or similar words reflecting such intent shall be sufficient to preclude the use of this section. Va. Code Ann. § 64.2-1003			
Washington			Unless expressly prohibited by the terms of the trust, a trustee may release the power to make adjustments under RCW 11.104A.020 and convert a trust into a unitrust… Wash. Rev. Code Ann. § 11.104A.040			Expressly prohibit in trust instrument
West Virginia		W. Va. Code Ann. § 44D-1-111 (Nonjudicial settlement agreements);	The governing instrument expressly prohibits use of this		Terms of trust prevail	Specific reference to statute or expressly prohibit in trust instrument

Appendix E:
50 State Survey of Statutory Carve Outs for Decanting, NJSAs, and Total Return Trust Conversion

STATE	Decanting Carve Out	NJSA Carve Out	Unitrust Carve Out	Decanting Opt Out Method	NJSA Opt Out Method	Unitrust Opt Out Method
		"The terms of a trust prevail over any provision of this chapter [except a list, NJSAs not included]." W. Va. Code Ann. § 44D-1-105	section by specific reference to this section or expressly reflects the grantor's intent that net income not be calculated as a unitrust amount. W. Va. Code Ann. § 44B-1-104a			
Wisconsin	The trust instrument creating the first trust expressly prohibits the trustee from appointing assets of the first trust to a 2nd trust by reference to this section or by using the term "decanting." Wis. Stat. Ann. § 701.0418	Wis. Stat. Ann. § 701.0111 (Nonjudicial settlement agreements); "The terms of a trust prevail over any provision of this chapter [except a list, NJSAs not included]." Wis. Stat. Ann. § 701.0105	A trust may not be converted under this section to a unitrust if any of the following applies: The trust instrument specifically prohibits the conversion. Wis. Stat. Ann. § 701.1106	Reference to statute or use the term "decanting"		Expressly prohibit in trust instrument
Wyoming	On distribution of trust income or principal pursuant to authority in the trust instrument to make discretionary distributions to a trust beneficiary, whether or not the discretionary distributions are pursuant to an	Wyo. Stat. Ann. § 4-10-111 (Nonjudicial settlement agreements); "The terms of a trust prevail over any provision of this act [except a list, NJSAs not included]." Wyo. Stat. Ann. § 4-10-105	This act applies to every trust or decedent's estate existing on July 1, 2007 or created thereafter except as otherwise expressly provided in the will or terms of the trust or in this act. Wyo. Stat.	None	Terms of trust prevail	Expressly prohibit in trust instrument

Appendix E:
50 State Survey of Statutory Carve Outs for Decanting, NJSAs, and Total Return Trust Conversion

STATE	Decanting Carve Out	NJSA Carve Out	Unitrust Carve Out	Decanting Opt Out Method	NJSA Opt Out Method	Unitrust Opt Out Method
	ascertainable standard, make distributions of all or any portion of trust income or principal in further trust. Wyo. Stat. Ann. § 4-10-816(xxviii)		Ann. § 2-3-917			

APPENDIX F

50 STATE SURVEY OF STATE LAW ON VALIDITY OF ARBITRATION CLAUSE IN WILL OR TRUST

Appendix F:
50 State Survey of State Law on Validity of Arbitration Clause in Will or Trust

STATE	Relevant Authority	Valid?
Alabama		
Alaska		
Arizona	A trust instrument may provide mandatory, exclusive and reasonable procedures to resolve issues between the trustee and interested persons or among interested persons with regard to the administration or distribution of the trust. Ariz. Rev. Stat. Ann. § 14-10205.	Yes
Arkansas		
California	Arbitration provision in amended trust was not enforceable against a beneficiary who did not sign the arbitration provision and who sought to have the amended trust set aside as the product of undue influence, even though the beneficiary was a proponent of an earlier trust instrument which had no arbitration clause, where the beneficiary did not accept benefits under the amended trust, nor did she attempt to enforce rights under the amended trust instrument. *McArthur v. McArthur*, 224 Cal. App. 4th 651, 168 Cal. Rptr. 3d 785 (2014), reh'g denied (Apr. 1, 2014), review denied (June 25, 2014).	No, but maybe
Colorado		
Connecticut		
Delaware		
D.C.	A will establishing a marital trust, which will directed that any material difference of opinion among the trustees of the marital trust would be resolved by arbitration, was not a written contract to submit controversies to arbitration, for purposes of District of Columbia's version of Uniform Arbitration Act, providing for immediate appeal of an interlocutory order denying an application to compel arbitration pursuant to a written contract. *In re Calomiris*, 894 A.2d 408 (D.C. 2006). However, the District of Columbia arbitration law has since been revised and to enforcement of "[a]n agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement" (D.C. Code § 16–4406(a)), so the result may be unclear.	
Florida	(1) A provision in a will or trust requiring the arbitration of disputes, other than disputes of the validity of all or a part of a will or trust, between or among the beneficiaries and a fiduciary under the will or trust, or any combination of such persons or entities, is enforceable. (2) Unless otherwise specified in the will or trust, a will or trust provision requiring arbitration shall be presumed to require binding arbitration under chapter 682, the Revised Florida Arbitration Code. If an arbitration enforceable under this section is governed under chapter 682, the arbitration provision in the will or trust shall be treated as an agreement for the purposes of applying chapter 682. Fla. Stat. Ann. § 731.401	Yes
Georgia		
Hawaii		
Idaho		
Illinois		
Indiana		
Iowa		
Kansas		
Kentucky		
Louisiana		
Maine		

Appendix F:
50 State Survey of State Law on Validity of Arbitration Clause in Will or Trust

STATE	Relevant Authority	Valid?
Maryland		
Massachusetts		
Michigan	No stipulation such as here involved can oust the jurisdiction of the probate court, permit the probate judge to abdicate his jurisdiction and power, or delegate it to a third person not a judicial officer, and no stipulation can provide for the determination of the status of the codicil in any other manner than that provided by statute. *In re Meredith's Estate*, 275 Mich. 278, 297, 266 N.W. 351, 357 (1936)	
Minnesota		
Mississippi		
Missouri	1. Subject to the exception in subsection 2 of this section, a provision in a trust instrument requiring the mediation or arbitration of disputes between or among the beneficiaries, a fiduciary, a person granted nonfiduciary powers under the trust instrument, or any combination of such persons is enforceable. 2. A provision in a trust instrument requiring the mediation or arbitration of disputes relating to the validity of a trust is not enforceable unless all interested persons with regard to the dispute consent to the mediation or arbitration of the dispute. Mo. Ann. Stat. § 456.2-205	Yes
Montana		
Nebraska		
Nevada		
New Hampshire	If the terms of the trust require the interested persons to resolve a trust dispute exclusively by reasonable nonjudicial procedures, then those interested persons shall resolve that trust dispute in accordance with the terms of the trust. N.H. Rev. Stat. Ann. § 564-B:1-111A	Yes
New Jersey		
New Mexico		
New York	The probate of an instrument purporting to be the last will and testament of a deceased and the distribution of an estate cannot be the subject of arbitration under the Constitution and the law as set forth by the legislature of the State of New York and any attempt to arbitrate such issue is against public policy. *In re Jacobovitz' Will*, 58 Misc. 2d 330, 334, 295 N.Y.S.2d 527, 531 (Sur. 1968)	
North Carolina		
North Dakota		
Ohio		
Oklahoma		
Oregon		
Pennsylvania		
Rhode Island		
South Carolina		
South Dakota	A provision in a trust requiring the arbitration of a dispute between or among the beneficiaries, a fiduciary under the will or trust, or any combination of them, is enforceable pursuant to the provisions of chapter 21-25A. S.D. Codified Laws § 55-1-54	Yes
Tennessee		

Appendix F:
50 State Survey of State Law on Validity of Arbitration Clause in Will or Trust

STATE	Relevant Authority	Valid?
Texas	We conclude that the arbitration provision contained in the trust at issue is enforceable against the beneficiary for two reasons. First, the settlor determines the conditions attached to her gifts, and we enforce trust restrictions on the basis of the settlor's intent. The settlor's intent here was to arbitrate any disputes over the trust. Second, the TAA requires enforcement of written agreements to arbitrate, and an agreement requires mutual assent, which we have previously concluded may be manifested through the doctrine of direct benefits estoppel. Thus, the beneficiary's acceptance of the benefits of the trust and suit to enforce its terms constituted the assent required to form an enforceable agreement to arbitrate under the TAA. *Rachal v. Reitz*, 403 S.W.3d 840, 842 (Tex. 2013), reh'g denied (Aug. 23, 2013)	Yes
Utah		
Vermont		
Virginia		
Washington		
West Virginia		
Wisconsin		
Wyoming		