


By **Todd A. Flubacher** & **Amy K. Kanyuk**

# Where There's a Will, There's Family

Pre-mortem validation and no-contest clauses to the rescue!

In recent years, many states have enacted pre-mortem validation statutes enabling testators or settlors to take proactive steps to avoid will or trust contests. Pre-mortem validation statutes provide a mechanism to be used during the testator's life to ensure testamentary documents are declared valid and to avoid post-death challenges. Another approach that offers a strong deterrent to will contests is the use of so-called "no-contest" provisions that have been validated by statute or case law.

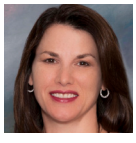
Pre-mortem validation statutes come in two varieties: judicial validation or a non-judicial procedure. Arkansas, North Carolina, North Dakota and Ohio have judicial validation statutes that apply only to wills. Alaska, Nevada and New Hampshire have judicial validation statutes that apply to wills and trusts. Will statutes are useful for individuals who are domiciled in those states, but trust statutes can be used by settlors located anywhere who use that situs for their trusts. South Dakota and Delaware are the only states that have non-judicial pre-mortem validation statutes.

## What's Behind the Change?

Few controversies can emotionally and financially destroy a family like a good old-fashioned will contest. Almost any deviation from a plain vanilla disposition, like cutting out a spouse or children, bequests to charities or caregivers, multiple marriages, stepchildren/siblings or children out of wedlock could invite challenges that wreak havoc on the testamentary plan. Regardless of whether undue influence, incapacity or elder abuse exists, those arguments are often made after the testator is gone, witnesses have died, facts have become muddled and the truth has evaporated into the mist of time.

Traditional will and trust challenges are fraught with the potential for error and inefficiency. The standard for testamentary capacity only requires the decedent to have known the nature and extent of her assets, the natural objects of her bounty and the disposition she's making of her property at the time the documents were signed.[1] The will could have been signed at a moment of transient lucidity or when the requisite capacity was lacking. Validity contests involve forensic reconstruction of facts that can be akin to reading tea leaves. As time goes by, memories fade and become distorted, and the best witness to attest to the decedent's intent, the decedent herself, is dead. Often, these cases involve dueling medical opinions reaching opposite conclusions and judges imposing their own beliefs and opinions about the veracity of witnesses and the decedent's state of mind. The motivations of family caregivers who stayed close at hand and may even have had the audacity to drive the testator to the lawyer's office to make changes that benefit the caregiver or reduce the interests of family members who withheld love and support in the waning years of life, are often a subject of speculation. Because of these limitations, improper contests are filed to force a settlement that departs from the decedent's intent.

Many planners erect safeguards beyond basic witnesses and self-proving affidavits in the hope of preventing a contest. Most estate planners follow the same rote procedures at every will signing so that they can testify that they never deviate from the same approach, thus ensuring consistency. It's advisable to remove from the room individuals accompanying a testator, such as

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the testator's children or caregiver/chauffeur, and have a private conversation with the testator to confirm capacity, understanding of the documents and the absence of influence. Some planners go as far as videotaping the signing if they suspect a challenge, although this creates its own perils.

## Judicial Validation

Pre-mortem validation is useful for a testator or trust settlor who suspects that a potential heir might challenge the will or trust after the testator dies. By bringing the action before death, he can ensure the evaluation of facts will occur shortly after signing the documents, thus avoiding many of the inadequacies of the will contest proceeding. The testator can testify and be evaluated, and facts should be assessed more accurately. Frivolous attacks will be deterred.

Statutes allowing a testator to petition a court to validate the will or trust vary slightly in their approach. Some prescribe a specific procedure, and others reference declaratory judgment procedures as the basis for pre-mortem validation. Thus, validation procedures vary based on applicable court rules and customs. Some statutes include language precluding the inference that a failure to file for a judgment declaring the validity of a will or trust might be construed as evidence that the will or trust shouldn't be deemed valid.[2]

Traditionally, one of the impediments to validating a will or revocable trust before death is that the document isn't yet final and irrevocable. It could be changed before death, and thus the issue of whether it's valid isn't yet ripe or justiciable. Pre-mortem validation statutes overcome this impediment. In *Matter of Cornelia K. Mampe*,[3] certain heirs challenged Cornelia's will and trust prior to her death. Pennsylvania doesn't have a pre-mortem validation statute, but the court allowed the action to continue as a declaratory judgment even though the case was, in essence, a will contest.[4]

The Uniform Trust Code (UTC) highlights the presumption that validation should occur after death. UTC Section 604 provides an accelerated post-death validation procedure for revocable trusts that become irrevocable at the settlor's death. It provides that an individual may commence a proceeding to contest the validity of a revocable trust three years after the settlor's death, but that period can be shortened from three years to just 120 days after the trustee sends the individual a copy of the trust instrument and a notice informing the individual of the trust's existence, the trustee's name and address and the time allowed for commencing a proceeding. While UTC Section 604 is a post-mortem validation statute, the comments to UTC Section 604 acknowledge that this doesn't preclude the settlor from pursuing a declaratory judgment during life.

In Alaska, a testator, the individual nominated to serve as personal representative or, with the testator's consent, any interested party, may petition the court to determine before the testator's death that the will is valid.[5] Alaska also has a statute that allows the settlor or trustee of a trust to petition the court to determine before the settlor's death that the trust is valid and enforceable under its terms.[6] Neither statute identifies the necessary parties to the proceeding, and both are otherwise light on details.

> Unlike the non-judicial validation statutes, judicial validation statutes don't provide the option of targeting specific individuals who pose the threat of a contest without inviting the entire family into litigation.

The statutes in Arkansas and North Dakota only apply to wills, and both incorporate the declaratory judgment procedures in their respective states. In Arkansas, the testator serves process on all beneficiaries under the will and all intestate heirs.[7] In North Dakota, a testator may institute a declaratory judgment proceeding concerning the validity of the will "as to the signature on




the will, the required number of witnesses to the signature and their signatures, and the testamentary capacity and freedom from undue influence of the person executing the will."[8] This statute is uniquely limited to a confined list of matters that can be addressed.

Ohio's statute permits an individual who "executes a will allegedly in conformity with the laws of [Ohio]" to file a "complaint" in the appropriate probate court, in the form determined by the probate court of the county where it's filed, for a judgment declaring the validity of the will.[9] The complaint must name "as parties defendant all persons named in the will as beneficiaries, and all of the persons who would be entitled to inherit from the testator under [intestacy laws]."[10] The Ohio statute hearkens a litigious tone using words like "allegedly," "complaint" and "defendant."

A unique feature of all three of Delaware's statutes is that a person is deemed to have been given notice if notice is given to another person who may represent and bind that person under Delaware's virtual representation statute.

North Carolina's statute goes into considerably more detail than most.[11] It describes the court where the petition must be filed and affirmatively requires the petitioner to produce at a hearing evidence necessary to establish that the will would be admitted to probate if the petitioner were deceased. If an interested party contests the validity of the will, that individual must file a written challenge before or at the hearing.

In Nevada, the maker or legal representative of a maker, of a will, trust or other writing constituting a testamentary instrument may have determined any question of construction or validity arising under the instrument and may obtain a declaration of rights, status or other legal relations thereunder.[12] The wording of Nevada's statute is intentionally broad, allowing the testator or her legal representative to bring an action on any question of construction or validity on broad relief related to rights, status or other legal relations.

New Hampshire allows judicial pre-mortem validation of both wills and trusts. The wills statute provides that notice must be given to interested parties, including the testator's spouse, intestate heirs, legatees under the will, the executor, the director of charitable trusts under state law (if a charity is named in the document) and any other individual who would be an interested party in a judicial proceeding to prove the will.[13] New Hampshire trusts can be judicially validated before death by a proceeding that's similar to the wills statute.[14] In addition, after the death of the settlor of a revocable trust, the limitations period for challenging the validity of the trust can be shortened to 180 days if the trustee sends a notice with certain information about the trust and the time allowed for contesting the trust.[15]

Unlike the non-judicial validation statutes, judicial validation statutes don't provide the option of targeting specific individuals who pose the threat of a contest without inviting the entire family into litigation. Additionally, judicial validation statutes have disadvantages that accompany litigation that could deter a testator from using the procedure. They require public proceedings. If capacity or undue influence is a borderline call, a judicial action could turn unpleasant, with the testator spending her remaining years in turmoil.

## Non-judicial Validation

South Dakota and Delaware have non-judicial pre-mortem validation statutes that preclude will contests via a notice procedure and relatively short statutes of limitations. South Dakota's statute only applies to trusts. Delaware has statutes that apply to wills, trusts and exercises of powers of appointment (POAs). Unlike will statutes that only apply to testators in that state, South Dakota and Delaware's statutes provide a powerful tool for settlors who live anywhere who can create a trust in, or move a trust to, that jurisdiction and follow the notice procedure to avoid validity challenges. A challenge to a will, trust or exercise of a POA only goes to court when the notice recipient files a challenge with the court within the limitations period. There are other clear advantages to the non-judicial pre-mortem validation


approach. It provides more flexibility, the possibility of avoiding litigation altogether, is far less expensive, can be used to target specific individuals (including non-beneficiaries) without including everyone and can avoid the embarrassment and publicity of a court proceeding.

In Delaware, a judicial proceeding to contest the validity of a revocable trust, an amendment thereto or an irrevocable trust may not be initiated later than 120 days after the date that the trustee notified the individual in writing of the trust's existence, the trustee's name and address, whether such individual is a beneficiary and the time allowed under the statute for initiating a judicial proceeding to contest the trust.[16]

Delaware's statute creates the presumption that notice mailed or delivered to the last known address of an individual constitutes receipt by that individual.[17] This presumption was tested in *Ravet v. Northern Trust Company*,[18] in which the court determined that the 120-day statute of limitations in Delaware's pre-mortem validation statute barred the settlor's son's claim that his mother's revocable trust was the product of undue influence. The trustee sent the required notice to the son's last known address, and the notice wasn't returned as undeliverable. Although the son claimed he never received the notice, he had no evidence that he didn't receive it, and the court held that the trustee had delivered notice in accordance with the statute sufficient to bar the son's claims.

Delaware also has a pre-mortem validation statute for wills and the exercise of a POA under a will.[19] A testator may provide notice of a will to any individual named in the will as a beneficiary, any individual who would be entitled to inherit under intestacy and any other individual the testator wishes to be bound as to the validity of the testator's will. The written notice must contain a copy of the testator's will and a statement that an individual who wishes to contest the validity of the will must do so within 120 days. Delaware's statute is broader than others, allowing notice to go to any individual the testator wishes to bind. A notice recipient who fails to bring a proceeding within 120 days is precluded from bringing an action thereafter or from participating as a party in any similar action brought by another individual. The limitations period doesn't apply if the testator dies during the 120-day period. There's a similar validation procedure and 120-day time period for a testator who exercises a POA in his will.[20] The testator may provide the written notice to any individual named in the exercise of the POA as a beneficiary, any individual who would be entitled to receive property over which the testator exercises the POA if the testator failed to validly exercise the POA, the trustees of a trust holding property subject to the POA and any other individual the testator wishes to be bound as to the validity of the exercise of the POA under the testator's will.

In addition, Delaware has a unique pre-mortem validation statute for the donee of a testamentary POA who exercises the power by any written instrument other than a will.[21] A judicial proceeding to challenge the exercise of such a POA may not be initiated later than 120 days after the exerciser notifies such individual in writing of the exercise of the power and other information specified in the statute (but only if the basis of the proceeding to contest the exercise is failure to comply with formalities for execution of the power or undue influence over, or lack of capacity of, the exerciser). This statute can be used by any holder of a POA over a Delaware trust, including trusts that were established in another jurisdiction but were moved to Delaware.

> Ironically, the litigation-reducing rationale for including no-contest clauses in documents is often defeated, because the very inclusion of such a clause often generates controversy on its own.

South Dakota's statute is similar to Delaware's, although it only applies to trusts. It provides that an individual may not commence a legal proceeding to contest the validity of a trust later than "Sixty days after the trustee, trust advisor, trust protector, or the settlor sent the person who is contesting the trust a copy of the trust instrument and a notice informing the person of the trust's existence, of the trustee's name and address, and of the time allowed for commencing a proceeding."[22]




South Dakota's 60-day limitations period is the shortest of any state.

South Dakota's statute was upheld in *Matter of Elizabeth A. Briggs Revocable Living Trust*,[23] although that case involved a post-death notice. The settlor had amended her will to disinherit her son. Shortly after her death, the attorney for her trust and estate sent the son a notice in accordance with the South Dakota statute, which triggered the 60-day limitations period. After the 60-day period expired, the son commenced a proceeding challenging the settlor's capacity and claiming undue influence and requesting an accounting. The court held that the son was barred by the 60-day limitations period and, because he wasn't a beneficiary, he lacked standing to seek an accounting.

As with total disinheritance, the drafter should (if possible under the particular circumstances) either articulate in the governing document or keep detailed notes of why the no-contest clause has been included.

It's significant that the Delaware and South Dakota statutes allow the testator or settlor to bind non-beneficiaries. This means that unlike judicial validation statutes in which all interested individuals are parties, they can be used to bind specific individuals, even those who aren't beneficiaries and intestate heirs. For example, if an individual or charity has never been included in the document but expects something or was included in a previous document but is subsequently removed, the notice can specifically bar a challenge by them. The pre-mortem notice can be used to flesh out challenging parties in a targeted fashion, without opening up litigation with the entire class of heirs. Both the South Dakota and Delaware statutes include provisions stating that a trustee shouldn't have any liability for failure to institute the pre-mortem notice and that failure to use the statutes won't be construed as evidence that the instrument isn't valid.

A unique feature of all three of Delaware's statutes is that an individual is deemed to have been given notice if notice is given to another individual who may represent and bind that individual under Delaware's virtual representation statute.[24] Consequently, the pre-mortem will validation statute can be effective to avoid challenges from minor, unborn, unascertainable or contingent remainder beneficiaries who may be bound under Delaware's virtual representation statute.

## No-Contest Clauses

A more traditional method of discouraging litigation in connection with a beneficiary's disappointment with his inheritance is the use of an in terrorem, or no-contest, clause in the document. Ironically, the litigation-reducing rationale for including no-contest clauses in documents is often defeated, because the very inclusion of such a clause often generates controversy on its own.[25]

A beneficiary who receives less than the amount to which he believes he's entitled or receives an inheritance in a way other than he anticipated (for example in trust, rather than outright) may decide to challenge the validity of a will on grounds such as fraud, duress, lack of capacity, undue influence or forgery. In an attempt to disincent the unhappy beneficiary from initiating such a challenge, the governing document may include a no-contest clause, which provides that the beneficiary will receive nothing if he challenges the validity of the document. Usually, the no-contest clause states that any beneficiary who challenges the document will be treated as if he predeceased the testator without descendants, even if the beneficiary actually has descendants. Treating the objecting beneficiary as having no descendants adds sharper teeth to the no-contest clause, because it keeps the property out of the beneficiary's family entirely.

Traditionally, courts have upheld the validity of no-contest clauses because public policy favors a person's right to dispose of his property on his death as he sees fit, and the clause represents the testator's clear intent. The testator's intent is the guiding principle of testamentary construction, and the court's job is to give effect to that intent.

Courts also uphold no-contest clauses because they're


a method by which to avoid will contests, which breed family animosity, expose family secrets better left untold and result in a waste of estates through expensive and long drawn-out litigation. Although invasion of privacy may be the least weighty reason courts uphold no-contest clauses, it may be the most important reason clients use them.[26] In 1898, the U.S. Supreme Court described the issue succinctly when it observed, "Experience has shown that often after the death of a testator unexpected difficulties arise…[and] contests are commenced wherein not infrequently are brought to light matters of private life that ought never to be made public, and in respect to which the voice of the testator cannot be heard either in explanation or denial, and as a result the manifest intention of the testator is thwarted." [27]

At common law, no-contest clauses were enforced regardless of whether probable cause existed to bring the challenge or whether the challenge was made in good faith. However, the Uniform Probate Code (UPC) (Sections 2-517 and 3-905) and the *Restatement (Third) of Property* (Section 8.5) (the *Restatement*) soften this rigid rule and provide that a no-contest clause is enforceable unless probable cause exists to bring the challenge. The *Restatement* says that probable cause exists when there's evidence that would lead a reasonable person to conclude that there's a substantial likelihood that the challenge will be successful. The probable cause exception protects a beneficiary's right to bring an action that gives the court information about the testator and the will and allows the court to determine the testator's intent.

Every state except Vermont has addressed no-contest clauses by statute or common law, and many states treat no-contest clauses in trusts the same as they're treated in wills. More than half of the states follow the approach of the UPC and the *Restatement* and recognize a probable cause exception to the enforcement of a no-contest clause.[28] Some states also require that the contest be brought in good faith.[29] Currently, Florida is the only state that statutorily prohibits a no-contest clause.[30]

Courts construe no-contest clauses narrowly because they result in the forfeiture of a beneficiary's inheritance, and courts are reluctant to divest beneficiaries of their interests. However, an action to construe, reform or modify the language of a will isn't a contest of the document or a violation of the no-contest clause, unless the relief requested by the beneficiary would invalidate the document. In certain circumstances, indirect action by a beneficiary, or action by a beneficiary acting on behalf of some other individual interested in the estate, may trigger the application of a no-contest clause. However, a suit to determine whether a particular fiduciary action is consistent with the governing document or to determine whether a particular challenge would violate the no-contest clause usually doesn't trigger the clause.

The governing document should say who'll inherit the forfeited property if the clause is triggered. If the client is using a pour over will that distributes the residue of the estate property to a revocable trust, both the will and the revocable trust should include the no-contest language. If the forfeiture clause is triggered, but the governing document doesn't say who'll inherit the forfeited property, the individual whose interest is forfeited can't then take the property through a residuary clause or the laws of intestacy.[31]

Avoiding challenges to a client's testamentary documents should be an objective of every estate plan.

Although the no-contest clause is a valuable tool, the clause shouldn't be part of the boilerplate of a document, especially in those jurisdictions that don't recognize the probable cause exception. Instead, drafters should include the clause only after discussing with the client his concerns about a potential will challenge after death, alternative methods of discouraging such a challenge and applicable state law. A no-contest clause will deter a challenge by a beneficiary only if the beneficiary has something to lose. If the beneficiary is disinherited completely, or left only a nominal inheritance, contesting the document will leave the beneficiary in no worse a position (except for the beneficiary's legal fees in bringing suit), but could have significant upside if the challenge is successful.

If a client truly wants to leave nothing to a spouse or family member who's expecting an inheritance, the client should disinherit that person completely, keeping in mind that it may be difficult or impossible to




completely disinherit a spouse.[32] However, beneficiaries who are disinherited often are angrier than those who've been left something other than what they expected. Accordingly, the drafting attorney should carefully document the client's reasons for a disinheritance and be prepared to explain those reasons to the disgruntled beneficiary after the client's death.

If the drafter and client determine that a no-contest clause is appropriate, the clause should be narrowly drafted to achieve the client's specific goal. For example, it may make sense to apply the no-contest clause only to a specific bequest, or to a specific beneficiary, rather than the entire document. The clause also should articulate what actions will trigger its application. For example, is it only the filing of a contest that will trigger the clause, or will providing financial support to others who are seeking a contest similarly trigger the clause?

As with total disinheritance, the drafter should (if possible under the particular circumstances) either articulate in the governing document or keep detailed notes of why the no-contest clause has been included. The beneficiary's discovery of the clause usually occurs after the person best suited to answer questions about it—the testator—has died, leaving the drafter in the unenviable position of having to justify the inclusion of the clause to the disappointed beneficiary.

## Avoiding Challenges

Avoiding challenges to a client's testamentary documents should be an objective of every estate plan. The use of pre-mortem validation techniques is one tool to accomplish this goal. If, however, those techniques aren't an available solution, or aren't feasible due to their public nature and the possibility that they will stir the hornet's nest during the client's lifetime to a degree that's unacceptable to the client, no-contest clauses may be an acceptable alternative. The client should be made aware, however, that no-contest clauses themselves can cause litigation and should be used only when the client has legitimate concerns about post-death challenges to the documents.

## Endnotes

1. *Restatement (Third) of Property* (the *Restatement*) Section 8.1(b).
2. *See* N.C.G.S.A. Section 28A-2B-1(c); N.H. Rev. Stat. Ann. Section 552:18 IX; N.H. Rev. Stat. Ann. Section 564-B:4-406(d)(8); OH ST 2107.081(B).
3. *In re Mampe*, 932 A.2d 954 (Pa. Super. Aug. 29, 2007).
4. *Ibid.*, at p. 958. The court, articulating the stumbling block that pre-mortem validation statutes seek to avoid, stated that under the Declaratory Judgment Act, it "has the ability to declare the legal rights, status, and legal relations of persons interested under a will or trust... [h]owever, a will may not be construed under the Declaratory Judgments Act unless there exists an actual controversy indicating imminent and inevitable litigation, coupled with a clear manifestation that the declaration sought will render practical help in ending the dispute."
5. Alaska Stat. Section 13.12.530.
6. *Ibid.*, Section 13.12.535.
7. A.C.A. Section 28-40-202.
8. NDCC Section 30.1-08.1-01.
9. OH ST Section 2107.081.
10. *Ibid.*
11. N.C.G.S.A. Section 28A-2B-1.
12. N.R.S. Section 30.040.
13. N.H. Rev. Stat. Ann. Section 552:18.
14. *Ibid.*, Section 564-B:4-406(d).
15. N.H. Rev. Stat. Ann. Section 564-B:4-406(b).
16. 12 Del. C. Section 3546.
17. *Ibid.*, Section 3546(a)(1).
18. *Ravet v. Northern Trust Company of Delaware and Barry C. Fitzpatrick in their capacity as co-trustees*, C.A. No. 7743-VCG, Order of the Delaware Supreme Court (Feb. 12, 2015).
19. 12 Del. C. Section 1311.
20. *Ibid.*, Section 1311 (c).
21. *Ibid.*, Section 1312.
22. SDCL Section 55-4-57.
23. *Matter of Elizabeth A. Briggs Revocable Living Trust*, 898 N.W.2d 465 (2017).
24. *See* 12 Del. C. Section 3547.
25. *See* Ronald D. Aucutt, et al., "Recent Developments–2018," 53rd Annual Heckerling Institute on Estate Planning. For recent examples of cases involving no-contest clauses, *see Duncan v. Rawls*, 812 S.E.2d 647 (Ga. 2018) (rejecting plea to adopt probable cause exception), *cert. denied,* 2018 Ga. LEXIS 713 (2018); *Succession of Laborde*, 251 So.3d 461 (La. Ct. App. 2018) (applying no-contest clause even though beneficiary was unaware of its existence when action was filed); *In re Connell Living Trust*, 426 P.3d 599 (Nev. 2018) (trustee's actions didn't trigger no-contest clause); and *EGW v. First Fed. Sav. Bank*, 413 P.3d 106 (Wyo. 2018) (upholding no-contest clause without regard to good faith or probable cause in bringing the action).
26. Martin D. Begleiter, "Anti-Contest Clauses: When You Care Enough to Send the Final Threat," 26 *Ariz. St. L. J.* 629, 636 (1994).
27. *Smithsonian Institution v. Meech*, 169 U.S. 398, 415 (1898).
28. *See, e.g.,* Alaska Stat. Sections 13.12.517, 13.16.555; Ariz. Rev. Stat. Ann. Section 14-2517; Cal. Prob. Code Section 21311; Colo. Rev. Stat. Sections 15-11-517, 15-12-905; *South Norwalk Trust Co. v. St. John*, 101 A.961, 962-964 (Conn. 1917); Haw. Rev. Stat. Section 560:2-517; Idaho Code Section1 5-3-905; Ind. Code. Ann. Sections 29-1-6-2, 30-4-2.1-3; *In re*


*Estate of Cocklin*, 17 N.W.2d 129 (Iowa 1945); *Hamel v. Hamel*, 299 P.3d 278 (Kansas 2013); 18-A Me. Rev. Stat. Ann. Section 3-905; Md. Code, Estates and Trusts, Section 4-413; Mich. Comp. Laws Ann. Sections 700.2518, 700.3905, 700.7113; Minn. Stat. Section 524.2-517; Miss. Code Section 91-8-1014; Mont. Code Section 72-2-537; Nev. Rev. Stat. Sections 137.005 (4), 163.00195 (4); N.J. Stat. Section 3B:3-47; N.M. Stat. Section 45-2-517; *Ryan v. Wachovia Bank & Trust Co.*, 70 S.E.2d 853 (N.C. 1952); N.D. Code Section 30.1-20-05; *Barr v. Dawson*, 158 P.3d 1073 (Okla. Civ. App. 2007); 20 Pa. Cons. Stat. Section 2 521; S.C. Code Section 62-3-905; S.D. Codified Laws Sections 29A-2-517, 29A-3-905, 55-1-46; Tenn. Code Section 35-15-1014; Tex. Est. Code Section 254.005, Tex. Prop. Code Section 112.038; Utah Code Sections 75-2-515, 75-3-905; *In re Estate of Chappell*, 221 P. 336 (Wash. 1923); *Dutterer v. Logan*, 137 S.E. 1 (W. Va. 1927); Wis. Stat. Section 854.19.

29. Neither the Uniform Probate Code, the Uniform Trust Code (UTC) nor the *Restatement* defines "good faith" for this purpose. At least one state has added a definition of "good faith" to its version of the UTC (*see* N.H. Rev. Stat. Ann. Section 564-B:1-103(30), which defines the term essentially as the observance of honesty and reasonableness).
30. *See* Fla. Stat. Section 732.517 (wills) and Section 736.1108 (trusts). Vermont has no statute or case law on the enforceability of no contest clauses. *See* T. Jack Challis and Howard M. Zaritsky, "State laws: No-contest Clauses" (2012 American College of Trust and Estate Counsel survey). In 2018, Indiana enacted legislation upholding the enforceability of no contest clauses. *See* Ind. Code Ann. Section 29-1-6-2 (wills) and Section 30-4-2.1-3 (trusts). Previously, Indiana statutorily prohibited a no-contest clause.
31. Georgia won't enforce a no-contest clause unless the governing document provides for the disposition of the property if the clause is triggered. *See* Ga. Code. Ann. Section 53-4-68 (wills) and Section 53-12-22 (trusts).
32. Almost all states recognize that the surviving spouse has some claim to a portion of the decedent spouse's estate, providing to the spouse a statutory "forced" or "elective" share of the decedent spouse's estate. Some states also have pretermitted spouse statutes, under which a spouse receives the part of the estate she would've received if the decedent had died intestate. The application of the elective share and pretermitted spouse statutes usually produces different results for the surviving spouse, because the pretermitted spouse statutes usually don't augment the probate estate with nonprobate transfers (such as the property of the decedent's revocable trust), whereas the elective share statute may include nonprobate property. *See In re Kulig*, 175 A.3d 222 (Pa. 2017) (pretermitted spouse share didn't include nonprobate property).