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THE RULE AGAINST *"IN TERROREM"* CONDITIONS: WHAT IS IT? WHERE DID IT COME FROM? DO WE REALLY NEED IT?

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> This branch of the law is one with which it is not very satisfactory to deal, and I cannot say that I think the mode in which it has been dealt with is very easy to weld into one consistent whole . . .
>
> Vaughan Williams L.J., *In Re Whiting's Settlement*, [1905] 1 Ch. 96 at p. 115 (C.A.).

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Testators are free to impose conditions, no matter how idiosyncratic, on gifts given in their wills. The outer limits of acceptability have been established by a series of judicially defined principles, including uncertainty, repugnancy, and public policy. Amongst these limiting principles, probably the most problematic, even controversial, is the rule against "*in terrorem*" clauses. Put simply, this principle prohibits the enforcement of a forfeiture clause which is unsupported by a gift over.

Traditionally, *in terrorem* language has been utilized by testators to enforce two types of conditions: conditions in partial restraint of marriage—typically clauses requiring that the beneficiary not marry without consent—and conditions forbidding the beneficiary from contesting the will. The effect of the rule against *in terrorem* clauses

is therefore to prevent a testator from using the threat of forfeiture either to insulate her will from attack or to compel marital obedience, unless the condition includes a gift over. A useful outline of the rule can be found in *Williams on Wills*:

> Certain conditions, if attached to a legacy of specific personal property or a legacy charged on personal estate only, may be void against the donee as made *in terrorem*, that it to say, as a mere idle threat to induce the donee to comply with the conditions, but not to affect the bequest, unless the testator shows that his intention was not merely to threaten or enjoin the donee by the condition, but to make a different disposition of the property in the event of non-compliance with the condition . . . [1]

Courts and commentators have long viewed the rule against *in terrorem* clauses with puzzlement, even mild contempt. In *Stackpole v. Beaumont* Lord Loughborough, the Lord Chancellor, in discussing the rule, concluded that "[i]t is impossible to reconcile the authorities, or range them under one sensible, plain, general rule."[2] In a similar vein, in *Re Dickson's Trust*, Lord Cranworth, the Vice-Chancellor, suggested that "[i]t is impossible to refer to the numerous cases on this subject, without feeling that the Judges, in deciding them, have never felt very sure of the ground on which they were treading."[3] And in *Leong v. Lim Beng Chye*, Lord Radcliffe, writing for the Privy Council, concluded that it is difficult "to rationalize such a rule or to ascertain precisely what are its limits or of what exceptions it may permit".[4]

This theme of judicial puzzlement continues to the present. In the relatively recent case of *Bellinger v. Nuytten Estate* the British Columbia Supreme Court gave effect to the rule.[5] However, in doing so, Hood J. noted that "[t]here seems to be a difference of opinion as to the basis of the rule, whether it is a rule of law or a rule of construction, whether it is founded on the intention of the Testator or on public policy, and as to whether evidence outside the Will itself is admissible for its operation."[6] In what follows, an attempt will be made to answer at least some of these questions.

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1. C. Sherrin, *Willams on Wills*, 8th ed. (London: Butterworths, 2002), at para. 34.13. See also J. MacKenzie, *Feeney's Canadian Law of Wills*, 4th ed. (Markham: Butterworth's, 2000), at paras. 16.61*ff*.
2. *Stackpole v. Beaumont* (1796), 3 Ves. 89 at p. 95, 30 E.R. 909.
3. *In Re Dickson's Trust* (1850), 1 Sim. N.S. 36 at pp. 43-4, 61 E.R. 14.
4. *Leong v. Lim Beng Chye,* [1955] A.C. 648 at p. 661 (P.C.).
5. *Bellinger v. Nuytten Estate* (2003), 50 E.T.R. (2d) 1, 13 B.C.L.R. (4th) 348, [2003] B.C.J. No. 828 (QL) (S.C.).

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1. The Birth of a Legal Fiction

The phrase "*in terrorem*"— translated variously as "in fear" and "as a warning"— refers to the fact that the language of the condition in question is judged to be a threat, and in the absence of a gift over, an empty threat at that. As Lord Radcliffe noted, the phrase is unfortunate, even question-begging:

> The phrase is scarcely a happy one if its only purpose is to describe a situation in which the law will not permit the legatee to have anything to be afraid of. In any event, the phrase merely describes the effect of the rule: it does not account for it.[7]

Although it is difficult to be certain from a review of the cases, it appears that the original form of the *in terrorem* rule was that applicable to clauses in partial restraint of marriage. Under English law conditions judged to be in *general* restraint of marriage were already void under the principle of public policy. However, conditions which constituted a *partial* restraint on marriage were held to be valid so long as they were not *in terrorem*. The meaning of "partial" in this context referred to conditions which were limited as to scope or duration. This could include conditions not to marry a particular individual, or members of a particular class; but most commonly they referred to conditions which required consent.[8]

This first branch of the rule was already established by the latter half of the seventeenth century. In 1663, three years after the restoration of the Stuart monarchy, an apparently special panel of the court of Chancery considered a case in which the will provided that the legatee should not marry without consent.[9] Having done so, the legatee's husband challenged the will. The judges held that "this Proviso was but *in terrorem*, to make the Person careful, and that it would not defeat the Portion."[10]

The cases suggest that England's court of Chancery implemented this rule as a result of its relationship with the ecclesiastical courts. The cases are equally clear that this origin shaped both the content and scope of the rule. By way of background it will be recalled that as early as the reign of Henry II, England's church courts exercised jurisdiction

6. *Supra,* at para. 10.
7. *Leong v. Lim Beng Chye, supra*, footnote 4, at p. 661.
8. Sherrin, *Willams on Wills*, *op. cit.*, footnote 1, at para. 35.38*ff*.
9. *Bellasis v. Ermine* (1663), 1 Ch. Ca. 22 at p. 22, 22 E.R. 674.
10. *Supra*.

in the case of disputed wills.[11] Holdsworth suggests that from this foothold, the church courts acquired jurisdiction over probate and administration, as well as over the conduct of executors.[12] The sixteenth century saw the rise of the court of Chancery exercising the principles of equity. In its early development Chancery was an imperialistic court, absorbing jurisdiction from other courts.[13] Amongst its victims were the ecclesiastical courts, and amongst its jurisdictional acquisitions was an expanding competence over estate matters.[14] Chancery's more efficient procedure meant that it was well suited to meet the needs of testamentary suitors.[15] Apart from jurisdiction, Chancery also looked to the ecclesiastical courts, and to the canon law, for doctrinal guidance. Holdsworth describes Chancery's indebtedness in the following terms:

> Whether we look at the substantive or the adjective law there administered, the influence of the rules and conceptions of the canon law, and thereof to some extent of the Roman civil law, can be traced. The procedure of the court of Chancery was derived from the canon law . . . [16]

In the case of testamentary matters, canon law, following Roman law, held all restraints on marriage, whether general or partial, to be abhorrent.[17] Chancery followed the lead of the canon law with respect to general restraints on marriage; however, it was not inclined to so with respect to partial restraints.[18] In order to overcome the resulting doctrinal divergence, and to ensure a degree of consistency in the testamentary decisions of the church courts and the court of Chancery, the latter implemented what was arguably a legal fiction — the

11. W.S. Holdsworth, *A History of English Law*, vol. 1, rev. ed. (London: Methuen, 1969), at p. 625.
12. *Ibid*., at pp. 625-6.
13. According to W.J. Jones, Chancery in the sixteenth century was "always a fierce competitor": *The Elizabethan Court of Chancery* (Oxford: O.U.P., 1967), at p. 403.
14. Holdsworth, *op. cit.*, footnote 11 at pp. 465-6.
15. According to Holdsworth, its procedure "made it possible to conceive distinctly the complicated equities which arise in the administration of an estate; and so it is the rules evolved by that court which have made our modern law on this subject": *Ibid.*, at p. 629. See also Jones, *op. cit.*, footnote 13, at pp. 400*ff*.
16. W.S. Holdsworth, *A History of English Law*, vol. iv, repr. edn. (London: Methuen, 1977), at p. 275. See also Sir Thomas Smith, *De Republica Anglorum* (London, 1565), at pp. 70-1; S.F.C. Milsom, *Historical Foundations of the Common Law*, 2nd ed. (London: Butterworths, 1981), at p. 90.
17. Browder, "Testamentary Conditions" (1938), 36 Mich. L. Rev. 1066 at pp. 1092-3.
18. See for example, *Stackpole v. Beaumont*, *supra*, footnote 2, at pp. 96-7. As early as 1677, in *Rightson v. Overton* (1677), 2 Freem. 20 at p. 21, 22 E.R. 1030, the Lord Chancellor is reported to have discussed the doctrinal difference:

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in terrorem rule.[19] The rule provided, in essence, that the testator had not really intended to impose the condition, and that therefore the condition would only be given effect if the testator demonstrated, by the inclusion of a gift over, that he was indeed in earnest. In his decision in *Re Dickson's Trust*, Vice-Chancellor Cranworth described the jurisdictional dynamics which lay behind the birth of the *in terrorem* rule:

> Inasmuch, therefore, as legacies may be sued for and recovered in the Ecclesiastical Courts, where the rule of the civil law would prevail, this Court has felt itself bound to conform to that law, in order that there might not be a conflict of decision in the two Courts. In cases, therefore, where a legacy has been given, coupled with a condition that the legatee shall not marry, then this Court has felt bound to hold that the testator could not really have meant what he has said; or, if he did mean it, then that he meant to prohibit what he had no right to prohibit; and so that his expressions must be considered as merely indicating his wishes, and, so far as they import a forfeiture of the bequest, used merely *in terrorem*. The rule itself, and the reasoning upon it, and the grounds which have been relied on as taking cases out of its operation, have been often stated to be unsatisfactory: but the rule is established, and it would be very unsafe to fall it in question in cases to which it applies.[20]

Of course this invocation of the testator's intention as a justification for the rule was entirely a matter of appearances — and was known to be so. Lord Thurlow frankly acknowledged the fiction: "I do not find

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> It was said *per Cancellar*, that in some cases this court takes notice of the civil law, and that is the reason why that, if a man [bequeaths] a legacy to a son or a daughter, &c., provided that he or she marry with the consent of the executor, &c., if the party marry without the consent of the executor, yet he shall have the legacy in this Court; and the reason why this Court decrees it so, is because by the civil law such a condition annexed to a legacy is void.
>
> But if the bequest be, that if he or she marries without the consent of the executor, J.S. shall have the legacy, there this court will give no relief, but J.S. shall have it; but Mr. Attorney said that by the opinion of several Doctors in a case now depending, the civil law is otherwise.

19. One later commentator describes it as a "grotesque fiction": Browder, *op. cit.*, footnote 17, at p. 1093.
20. *In Re Dickson's Trust*, *supra*, footnote 3, at p. 44. In 1796, in his decision in *Stackpole v. Beaumont*, *supra*, footnote 2, at p. 96, Lord Chancellor Loughborough similarly sought the origin of the rule in the desire of the Chancery to harmonize its judgments with those rendered by the ecclesiastical courts: ". . . the inconvenience of proceeding by a different rule in the concurrent jurisdiction (it is not right to call it so) in the resort to this Court instead of the Ecclesiastical Court, upon legatory questions, which after the Restoration was very frequent, in the beginning embarrassed the Court."

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it was ever seriously supposed to have been the testator's intention to hold out the terror of that which he never meant should happen."[21]

The second branch of the rule against *in terrorem* conditions—the branch applicable to "no contest" conditions—appears to have been in use by the late seventeenth century. In 1688, the year of England's Glorious Revolution, the court of Chancery heard the case of *Powell v. Morgan*, a case in which a legatee under a will disputed the validity of that will.[22] According to the very cursory report the legacy had been given on condition that the legatee not dispute the will. The court considered the validity of the condition, and in the end declined to enforce it, concluding that "there was *probabilis causa litigandi*".[23] By the early eighteenth century the second branch of the rule appears to have been firmly established. In *Morris v. Borroughs* the court held a forfeiture clause to be void on the following grounds:

> There was a provision made by the will, that any legatee controverting the disposition the testator had thereby made of his estate, should forfeit his legacy, this was held clearly to be *in terrorem* only, and thus no such forfeiture could be incurred by contesting any disputable matter in a court of justice.[24]

As with the application of the *in terrorem* rule to conditions in restraint of marriage, its application to no-contest conditions was effectively limited by the operation of the public policy principle. English courts already treated conditions which were judged to amount to attempts to oust the jurisdiction of the courts in testamentary and probate matters to be void and unenforceable.[25] The practical focus of the *in terrorem* rule was therefore conditions which attempted to insulate the will from challenges of the sort typically mounted by beneficiaries, such as challenges to testamentary capacity.[26]

2. The Characteristics of the English Rule

Given the application of the rule against *in terrorem* language not only to conditions requiring consent to marriage, but also to no-contest

21. *Scott v. Tyler* (1788), Dick. 712 at pp. 718-19, 21 E.R. 448.
22. *Powell v. Morgan* (1688), 2 Vern. 90, 23 E.R. 668.
23. *Supra,* at p. 91.
24. *Morris v. Borroughs* (1737), 1 Atk. 399 at p. 404, 26 E.R. 253.
25. *Re Wynn's Will Trusts*, [1952] 1 All. E.R. 341 at p. 346, [1952] Ch. 271 (Ch.); Sherrin, *op. cit.*, footnote 1, at para. 35.38*ff*.
26. *Cooke v. Turner* (1846), 15 M. & W. 727, 153 E.R. 1044; *Cleaver v. Spurling* (1729), 2 P. Wms. 526, 24 E.R. 846.

conditions, the question arises as to whether the rule might be applicable to other testamentary conditions. This possibility is noted in *Williams on Wills*.[27] However, the authority supporting this approach is limited. And in fact the English courts appear to have been at pains to limit the application of the rule. In *Re Dickson's Trust* — a case in which a legacy was made conditional on the legatee declining to become a nun — Lord Cranworth considered an argument for the existence of "a supposed rule of law" that any condition which is buttressed by a forfeiture clause must include a gift over if it is to be enforceable.[28] However, he rejected the argument: "I do not . . . think that any such rule of law exists."[29] In the later case of *Re Hanlon*, a similar argument was considered, and again rejected.[30] In that case the will required the legatee not only not to marry a particular individual, but also not to live with him as his wife, or misconduct herself with him, or leave home with the intention of living with him, or be delivered of a child by him. The will provided that if any of these conditions were breached the legacy would be forfeit; but it failed to include a gift over. Several of the conditions having been breached, Eve J. held that they were enforceable because the rule against *in terrorem* conditions simply did not apply to the variety of conditions contained in the will:

> [T]he *in terrorem* doctrine applies only to conditions relating to marriage and disputing the will; it does not affect the other conditions to which she is subjected, and, in my opinion, so long as A.B. is living the trustees cannot be authorized to make over to Miss Hanlon her share of the residue. I therefore answer the . . . question [put to me by saying that the defeasance clause is not void]. [Emphasis added.][31]

Apart from confining the scope of the rule to these two conditions, the cases also clarify other features of the rule as it was developed by the English courts. In the first place it was established at an early date that the rule only applied to a legacy of either personal property or, at most, to a mixed fund deriving from personal and real property; it did not apply to a devise of real property.[32] Thus in his decision in *Pullen v. Ready* Lord Hardwicke held that it was only with respect to personalty

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27. Sherrin, *op. cit.*, footnote 1, at para. 34.13, n. 5.
28. *In Re Dickson's Trust*, *supra*, footnote 3.
29. *Supra,* at p. 43.
30. *Re Hanlon*, [1933] Ch. 254 (Ch.).
31. *Supra,* at p. 260.
32. According to *Halsbury's Laws of England*, 4th ed., vol 50 (London: Butterworths, 1998), at para. 373, the rule "does not apply to devises of realty, or to bequests

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that a condition not to marry without consent could be considered as *in terrorem*.[33] In the later case of *Re Hanlon*, Eve J. made the same point even more emphatically: "This doctrine applies to cases where the subject of the gift is personalty or a mixed fund representing the proceeds of sale of real estate and personalty."[34]

The reason for this restriction lay in the origins of the rule, and in particular in the fact that the jurisdiction of England's ecclesiastical courts was itself limited to personal property.[35] It followed that, to ensure consistency, Chancery would only apply the *in terrorem* rule to conditions applicable to personal property.[36]

The English courts also considered whether the *in terrorem* rule was applicable not only to conditions subsequent, but also to conditions precedent. Some cases implied that the rule was only applicable in the case of conditions subsequent.[37] Such a restriction would have been significant given that conditions requiring consent would more likely be conditions precedent.[38] In *Leong v. Lim Beng Chye*, Lord Radcliffe, writing for the Privy Council, adopted a non-committal position; he raised the issue but without settling it:

> Moreover, although it was the view of Mr. Jarman that, subject to certain established exceptions, conditions precedent were as much within the rule as conditions subsequent, it is only necessary for the present purpose to tread on the surer ground of conditions subsequent.[39]

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charged on real estate, or on personalty directed to be laid out in the purchase of real estate." See also Sherrin, *op. cit.*, footnote 1, at para. 34.16.

33. *Pullen v. Ready* (1743), 2 Atk. 587 at p. 590, 26 E.R. 751.
34. *Re Hanlon*, *supra*, at p. 260.
35. In his *History of English Law*, vol. 1, *op. cit.*, footnote 11, at p. 625, Holdsworth highlighted the lasting implications of this limitation of the jurisdiction of the church courts:

    > The ecclesiastical courts obtained jurisdiction over grants of Probate and Administration, and, to a certain degree, over the conduct of the executor and the administrator. All these branches of their jurisdiction could be exercised only over personal estate. This abandonment of jurisdiction to the ecclesiastical courts has tended, more than any other single cause, to accentuate the difference between real and personal property; for even when the ecclesiastical courts had ceased to exercise some parts of this jurisdiction, the law which they had created was exercised by their successors.

    See also Milsom, *op. cit.*, footnote 16, at p. 87.
36. *Pullen v. Ready*, *supra*, footnote 33, at p. 590.
37. Thus in *In Re Dickson's Trust*, supra, footnote 3, at p. 44, Lord Cranworth noted that the rule "depends for its principle, not merely on the form in which the intention is expressed: not merely on its being a condition subsequent; but also on the nature of the condition which is to determine the legacy . . ."
38. Browder, *op. cit.*, footnote 17, at p. 1095n.
39. *Leong v. Lim Beng Chye*, *supra*, footnote 4, at p. 660.

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This caution notwithstanding, it is apparent from the reports that in a number of cases courts applied the rule to conditions precedent as easily as to conditions subsequent.[40] It therefore seems safe to conclude that the rule, as it was shaped by the English courts, was applicable to both conditions subsequent and conditions precedent.

3. Contrasting Developments Outside England

The English courts have thus developed a rule which is based on a legal fiction, which is applicable to only two conditions (these being conditions in partial restraint of marriage and no-contest conditions), which is limited to legacies of personal property, and which provides that a provision for forfeiture will not be enforced where it appears that the provision was merely a threat — merely "*in terrorem*" — the latter evidenced by a failure to include a gift over.

Looking beyond England, it appears that this rule was imported, largely unchanged, by the Australian courts. In *Gaynor*[41] the testator had bequeathed personal property to his two children, provided that if either instituted any action "to contest any of the provisions" of the will, the interest of that party would be forfeit. However, the forfeiture clause did not include a gift over. The daughter brought a statutory action seeking further provision for herself and as such the question arose as to whether the forfeiture clause was enforceable. In the result the Supreme Court of Victoria held that the condition was unenforceable. In so concluding, O'Bryan J. focused on two grounds. On the one hand he held that insofar as it purported to prohibit a party from exercising a statutory right—and specifically, from advancing a claim authorized by statute—the condition must be held to be void on grounds of public policy.[42] However, as an additional ground, O'Bryan J. considered, and ultimately accepted, the English rule against *in terrorem* conditions. On the basis of English authorities he concluded that the instant condition was unenforceable because it lacked the requisite gift over:

> In my opinion, this being a condition subsequent attached in the case of the daughter's legacy to a gift of personalty which provides for a bare forfeiture on the happening of the condition with no gift over on forfeiture, having regard to the nature of the condition, I must on the authorities hold that it is merely imposed *in terrorem* and is repugnant to the gift and void.[43]

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40. See, for example, *Malcolm v. O'Callaghan* (1817), 2 Madd. 349, 56 E.R. 363.
41. *In the Will of Gaynor*, [1960] V.R. 640 (S.C.).
42. *Supra,* at pp. 642-4.
43. *Supra,* at p. 642. See also *In Re Chester*, [1978] 19 S.A.S.R. 247 at p. 262 (S.C.); *In the Matter of the Will of D H W v. Perpetual Trustees*, (unreported, July 9,

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In contrast with Australia, the English rule has generally been rejected in the United States.[44] In the case of no-contest conditions in particular, courts in most American jurisdictions have been downright hostile to the English rule. In a fairly representative decision[45] the California Supreme Court attacked the English rule as being grounded in little more than an irrational deference to past authority:

> It rests upon no substantial distinction, and, where recognized, it is adopted in deference to the weight of earlier adjudications. It was not a part of the common law as such, but came to be recognized in England by the chancery courts to preserve uniformity, since legacies could be sued for and recovered in the ecclesiastical courts which followed the rules of the civil law. By the civil law the fiction was introduced that, unless there was a gift over of such legacy, a forfeiture would not be decreed . . . If it be that the rule anciently rested for its support upon the doctrine of public policy, we find, even in England, where the rule prevails, that such support has been withdrawn. If it rests, as it seems to have rested in England, upon the desire of the chancery court to conform to the decisions of the ecclesiastical court, such a reason does not in this state obtain. In brief, no reason can be shown why such a rule founded neither upon public policy, nor the dictates of the common law, should by us be given recognition. The reason which may have existed in other jurisdictions does not here exist; and, in the absence of the reason, the rule itself should not be followed.[46]

The rule adopted in most, if not all, American jurisdictions accepts, as its starting point, the enforceability of conditions which provide for the forfeiture of a legacy in the event that the legatee contests the will. This approach is justified on the twin grounds of effectuating testamentary intention and avoiding vexatious litigation.[47] The presence or absence of a gift over has generally been viewed as

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1998, Tasmania S.C., Judgment No. 83/1998). It appears that the English rule was also adopted in New Zealand; see the account of the rule in J.D. Willis, *Garrow and Willis's Law of Wills and Administration and Succession on Intestacy*, 4th ed. (Wellington: Butterworths, 1971), at pp. 481-2.

44. See the discussion in "Will-Forfeiture By Contesting Beneficiary", 23 A.L.R. 4th 369. See also Browder, *op. cit.*, footnote 17, at pp. 1092-1102. I am here primarily concerned with case law rather than legislation, and with the treatment American courts have given the no-contest branch of the *in terrorem* rule.

45. *In Re Hite's Estate*, 101 P. 443 (Cal. Sup. Ct. 1909).

46. *Supra,* at p. 447. This analysis has been cited by subsequent authorities, including *Barry v. American Security and Trust Co.*, 135 F.2d 470 at p. 472 (D.C. C.A. 1943); *Wilkes v. Freer,* 271 F. Supp. 602 at p. 605 (D.C. Dist. Ct. 1967).

47. For example, in *Goforth v. Westfahl,* 674 P.2d 21 at pp. 23-4 (Okl. Sup. Ct., 1983) the court noted as follows:

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irrelevant. Thus in *Burtman v. Burtman* the Supreme Court of New Hampshire held as follows:

> The American courts have generally held that in passing upon the validity of testamentary clauses against contests of the will, no distinction will be drawn between real and personal property and none will be made because of the presence or absence of a gift over. "In most jurisdictions the validity of these conditions [against contesting the will and the like] has been assumed whether there is any gift over or not, and whether the property disposed of is realty or personalty." . . . With this view we are in accord.[48]

At the same time, an exception to this assumption of enforceability has been recognized. Where, in contesting the will, the beneficiary acts in good faith and for "probable cause" the condition providing for forfeiture will not be enforced. In its decision in *Ryan v. Wachovia Bank & Trust Co.* the Supreme Court of North Carolina adopted the following summary of the exception:

> It is further held that where there exists *probalis causa litigandi*, that is, a probable or plausible ground for the litigation, a condition in a will that a legatee shall forfeit his legacy by contesting the will, is not binding, and under such circumstances a contest does not work a forfeiture.[49]

It is true that recognition of this exception has not been universal. In some jurisdictions no-contest conditions have been upheld even where the will has been contested in good faith and with probable cause.[50] It is also true that in some jurisdictions the "probable cause" exception has been fairly severely circumscribed. For example, in *Alper v. Alper* the court held that the existence of probable cause would result in the non-enforcement of the forfeiture condition where the challenge was based on either of two grounds: forgery and subsequent revocation. But where the will was challenged on other grounds

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> The validity of no contest clauses has been explicitly and implicitly acknowledged by this Court. Because no contest clauses protect estates from costly, time consuming and vexatious litigation; and serve to minimize family bickering concerning the competence and capacity of the testator, as well as the amounts bequeathed, they are favored by public policy. A provision in a will which requires forfeiture of a bequest or devise in the event of a contest of the will is binding on the legatee or devisee. The *in terrorem* clause must be strictly construed against forfeiture, enforced as written, and interpreted reasonably in favor of the beneficiary . . .

48. *Burtman v. Burtman,* 85 A.2d 892 at p. 894 (N.H. Sup. Ct. 1952).
49. *Ryan v. Wachovia Bank & Trust Co.,* 70 S.E.2d 853 at p. 855 (N.C. Sup. Ct. 1952).
50. See the discussion in "Will-Forfeiture By Contesting Beneficiary", *op. cit.*, footnote 44, at pp. 380-1.

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— these including fraud, undue influence and improper execution — the condition would be deemed to be enforceable.[51]

The foregoing notwithstanding, the weight of American authority appears to favour the existence of a "probable cause" exception to the overarching rule that forfeiture clauses are deemed to be enforceable.[52] It is also noteworthy that under the *Uniform Probate Code*, a provision in a will which purports to penalize an interested person for contesting a will is rendered unenforceable where probable cause exists for instituting proceedings.[53]

In justifying the existence of this exception, American courts have focused, in particular, on the public need for the courts to be able to exercise their supervisory role in testamentary matters — something which cannot happen unless interested parties are allowed some scope for objection. In *South Norwalk Trust Co. v. St. John* the court offered the following justification:

> Courts exist to ascertain the truth and to apply it to a given situation, and a right of devolution which enables the testator to shut the door of truth and prevent the observance of the law is a mistaken public policy . . . Where the contest has not been made in good faith, and upon probable cause and reasonable justification, the forfeiture should be given full operative effect. Where the contrary appears, the legatee ought not to forfeit his legacy. He has been engaged in helping the court to ascertain whether the instrument purporting to be the will of the testator is such.[54]

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51. *Alper v. Alper*, 65 A.2d 737 at p. 740 (N.J. Sup. Ct. 1949).
52. In *Ryan v. Wachovia Bank & Trust Co.*, *supra*, footnote 49, at p. 855, the court noted as follows:

    > It seems, however, that the weight of authority in this country supports the view that a no-contest or forfeiture clause in a will is subject to the exception that where the contest or other opposition of the beneficiary is made in good faith and with probable cause, such clause is not binding and a forfeiture will not result under such circumstancesÖ In our opinion, these authorities give sound and logical reasons for the adoption of the probable cause rule.

    Again, in *Haynes v. First Nat'l State Bank,* 432 A.2d 890 at 903-04 (N.J. Sup. Ct. 1981) the court, having noted that the "probable cause" exception has not been universally recognized, continued:

    > On the other hand, a majority of jurisdictions have declined to enforce *in terrorem* clauses where challenges to testamentary instruments are brought in good faith and with probable cause . . .

    It is also to be noted that the "probable cause" principle found earlier expression in the English case law. In *Powell v. Morgan, supra*, footnote 22, at p. 91, the court considered the validity of a no contest condition, and in the end declined to enforce it, concluding that "there was *probabilis causa litigandi*". See also Browder, *op. cit.*, footnote 17, at p. 187*ff*.
53. *Uniform Probate Code*, 1969 Act, s. 2-517.
54. *South Norwalk Trust Co. v. St. John*, 101 A. 961 at p. 963 (Con. Sup. Ct. 1917). See also *Porter v. Baynard,* 28 So. 2d 890 at p. 897 (Fl. Sup. Ct. 1946).

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In *Ryan v. Wachovia Bank & Trust Co.* the Supreme Court of North Carolina indicated that the court's mandate to establish the truth must ultimately trump concerns about vexatious litigation:

> Forfeiture clauses are usually included in wills to prevent vexatious litigation, but we should not permit such provisions to oust the supervisory power of the courts over such conditions and to control them within their legitimate sphere. Friend's Estate, supra. There is a very great difference between vexatious litigation instituted by a disappointed heir, next of kin, legatee or devisee, without probable cause, and litigation instituted in good faith and with probable cause, which leads the contestant to believe that a purported will is not in fact the will of the purported testator. We think it is better to rely upon our trial courts to ascertain the facts in this respect.[55]

And in *Goforth v. Westfahl*, the court stressed that the public policy in favour of effectuating testamentary intent must ultimately give way to the public policy favouring an heir's exercise of her rights and duties as executor under applicable estate legislation:

> An attempt in good faith to probate a later purported will, spurious in fact, but believed to be genuine by the one presenting it for probate, does not render the offeror subject to the forfeiture provisions of no contest clause if he/ she has probable cause to believe that the instrument is genuine and entitled to probate. This rule is premised on two tenets: 1) It cannot be presumed that the testator intended to limit his/her freedom of subsequent testamentary action, and 2) it is the duty of a legatee/devisee, named as executor, to offer a subsequent will for probate, and it would be contra to public policy to subject him/her to sanctions for performing a statutory duty.[56]

The question inevitably arises as to the meaning of "probable cause". Some guidance can be found in the Supreme Court of Iowa's decision in *Geisinger v. Geisinger*. In that case the will in issue included a no-contest condition. Nonetheless, two of the beneficiaries sought construction of the will; they also objected to certain codicils on the ground of lack of testamentary capacity. The issue arose as to whether the forfeiture provision should be enforced. Having heard evidence as to the capacity of the testator, the trial judge held that the forfeiture clause should not be enforced, the objections having been made in good faith and for probable cause. This conclusion was

55. *Ryan v. Wachovia Bank & Trust Co.*, *supra*, footnote 49, at pp. 856-7.
56. *Goforth v. Westfahl, supra*, footnote 47, at p. 25.

upheld on appeal. In so doing, the court considered the meaning of "probable cause" in the following terms:

> One has probable cause for initiating civil proceedings against another if he reasonably believes in the existence of facts upon which his claim is based and reasonably believes that under such facts the claim may be valid at common law or under an existing statute, or so believes in reliance upon the advice of counsel received and acted upon as stated in the foregoing authorities. Restatement of the Law, Torts, section 675. Evidence contestants acted upon the advice of counsel was considered in the Cocklin case. We hold the trial court in the case at bar did not err in giving evidence of that character substantial weight. [Emphasis added.][57]

4. The Approach of the Canadian Courts

Unlike the American courts, the Canadian courts have adopted the English rule.[58] The state of Canadian law in this regard had clearly been established by the early twentieth century when R.E. Kingsford published his Canadian adaptation of *Jarman's Treatise on Wills*.[59] Kingsford summarized the rule against *in terrorem* conditions in a form which would have been easily recognizable to an English audience:

> In certain cases, to be presently mentioned, a condition in restraint of marriage or a condition not to dispute a will, may be annexed to a testamentary gift, but where the subject of gift is personalty, such a condition must, as a general rule, be accompanied by a gift over, otherwise the condition will be treated as merely *in terrorem*, and therefore void. It will be seen, however, that there is some doubt as to the application of the doctrine to conditions precedent in partial restraint of marriage.[60]

As will be clear from the foregoing, Canadian law has preserved both branches of the English *in terrorem* rule. The scope of the first branch, again as with the English rule, has been limited to partial restraints on marriage. Conditions which constitute an absolute restraint on marriage are already dealt with under the public policy

57. *Geisinger v. Geisinger,* 41 N.W.2d 86 at p. 93 (Io. Sup. Ct. 1950).
58. See the discussion in MacKenzie, *op. cit.,* footnote 1, at paras. 16.61*ff*.
59. R.E. Kingsford, *The Law Relating to Wills, Adapted to the Provinces of the Dominion of Canada: Being Jarman's Treatise on Wills*, 6th ed. (Toronto: Carswell, 1913).
60. *Ibid*., at pp. 712-13.

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principle — and under that principle are void and unenforceable.[61] The cases suggest that what remains — conditions involving partial restraints — will include conditions requiring consent, and conditions against remarriage. Canadian courts have generally upheld these types of conditions so long as they are not *in terrorem*.[62]

In *Re Estate of Frank Pashak* the bequest in issue provided that the testator's widow was to receive the testator's property "as her own absolute property . . . as long as she remains my widow."[63] The Alberta Supreme Court considered the argument that the testator did not intend the condition to be in partial restraint of marriage, but intended simply to provide for his widow until she was remarried.[64] However, Simmons J. looked past this possibility, focusing instead on the fact that in other respects the case fell within the scope of the rule as defined by the English authorities. As such he held the condition to be *in terrorem*, with the result that the widow could take the estate absolutely.

A similar approach was adopted by the Saskatchewan Court of King's Bench in *Re Schmidt Estate*. In this case the testator's will provided that his entire estate was to pass to his wife, but if she should remarry she was only to receive half the estate. The court noted both the lack of a gift over and the fact that the bequest qualified as a blended gift of personalty and realty. It held that the rule against *in terrorem* conditions applied, and the condition was therefore void.

Apart from struggling with the meaning of "partial" restraint, Canadian courts have also considered the type of gift to which the rule applies — and again, following the English approach, they have confined its application to gifts of personalty and to mixed gifts of personalty and realty. In *Re Hamilton* the testator had left a will providing an annual income for his son; however, the will further provided that if the son married with consent, he would "receive the whole annual income of the estate during his life."[65] The condition did not include a gift over. The son married without consent, and then sought a construction of the will. The Ontario High Court of Justice relied on English authority and concluded, having particular regard to

61. *Re Cutter* (1916), 31 D.L.R. 382 (Ont. S.C.); *Re Haythornthwaite,* [1930] 3 D.L.R. 235 (Alta. S.C.).

62. See *Cowan v. Allen* (1896), 26 S.C.R. 292; *Re Deller* (1903), 6 O.L.R. 711 (H.C.); MacKenzie, *op. cit.*, footnote 1, at paras. 16.57*ff*.

63. *Re Estate of Frank Pashak,* [1923] 1 D.L.R. 1130 (Alta. S.C.), at p. 1131.

64. *Supra,* at p. 1132: "There is no doubt that this may defeat the plain intention of the testator who evidently may have intended only to provide for his widow in a suitable way while she had no other means of support than that provided in the will."

65. *Re Hamilton* (1901), 1 O.L.R. 10 (H.C.J.).

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the lack of a gift over, that the forfeiture condition was merely *in terrorem* and unenforceable.[66] The problematic feature of the case arose from the fact that the bequest effectively included real property. In dealing with this issue Boyd C. noted that the rule applied not only to personalty but also to a mixed fund comprised of personalty and converted realty. He concluded that where a bequest effectively "massed" personal and real property together, this was sufficient to bring the condition within the scope of the rule, thus nullifying the provision for forfeiture.

Canadian cases dealing with conditions in partial restraint of marriage appear now to be less common. Of course this may have more to do with social and cultural changes than with legal changes. In any case, the law as outlined in *Re Estate of Frank Pashak* and *Re Hamilton* appears still to be the law in Canadian jurisdictions. The more recent Canadian *in terrorem* case law has focused on the application of the *in terrorem* rule to no-contest clauses.[67] These cases indicate that the scope of this branch of the rule is effectively limited to conditions which prohibit common law proceedings.[68] Conditions which purport to prohibit proceedings pursuant to dependents' relief legislation, as well as conditions which are judged to constitute attempts to exclude the jurisdiction of the courts, will be held to be void pursuant to the principle of public policy.[69]

Two decisions of the British Columbia Supreme Court are worth particular note: *Kent (Re)*[70] and *Bellinger v. Nuytten Estate*.[71]

In *Kent (Re)* the condition in issue provided:

> . . . that if any person who may be entitled to any benefit under this my Will shall institute or cause to be commenced any litigation in connection to any of the provisions of this my Will other than for any necessary judicial interpretation thereof or for the direction of the Court in the course of administration all benefits to which such person would have

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66. *Supra,* at p. 12. Boyd C. summarized the law, in part, as follows, at p. 11:

> The law has long been settled that if a man gives a legacy to his son in case he marries with consent of executor, and he marry without, yet he shall have the legacy in the Court of Chancery, and the reason given was, that the Court adopted the rule of the civil and ecclesiastical law by which such a condition was void or regarded as merely *in terrorem*.

67. See also the older case of *Harrison v. Harrison*, [1904] 7 O.L.R. 297.
68. T. Todd, "Forfeiture Clauses in Wills" (2003), 12 The Scrivener 62 at p. 65.
69. *Re Bronson*, [1958] O.R. 367, 14 D.L.R. (2d) 51 (H.C.); *Kent (Re)* (1982), 139 D.L.R. (3d) 318, 13 E.T.R. 53, [1982] 6 W.W.R. 165 (B.C.S.C.); *Bellinger v. Nuytten Estate, supra*, footnote 5. See also Todd, *op. cit.*, footnote 68, at p. 65.
70. *Kent (Re)*, *supra*, footnote 69.
71. *Bellinger v. Nuytten Estate, supra*, footnote 5.

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> been entitled shall thereupon cease . . . [the] said benefits so revoked shall fall into and form part of the Residue of my Estate to be distributed as directed in this my Will . . .[72]

The testator's children wanted to bring an application for support pursuant to B.C.'s *Wills Variation Act*. The question arose as to whether such a proceeding constituted "any litigation" within the meaning of the forfeiture clause. The court, having answered that question in the affirmative, considered the further question as to whether the forfeiture clause was void as being *in terrorem*. Lander L.J.S.C. summarized the test as follows:

> There are three criteria which must be met before the doctrine *in terrorem* is applicable:
>
> (i) The legacy must be of personal property or blended personal and real property . . .
>
> (ii) The condition must be either a restraint on marriage or one which forbids the donee to dispute the will.
>
> (iii) The "threat" must be "idle". That is the condition must be imposed solely to prevent the donee from undertaking that which the condition forbids. Therefore a provision which provides only for a bare forfeiture of the gift on breach of the condition, is bad.[73]

With respect to the crucial third requirement, Mr. Justice Lander noted — here echoing the orthodox position — that the inclusion of a gift over is sufficient evidence that the condition was not simply an idle threat. Holding that the clause in issue contained a residuary gift, he concluded that this was sufficient to meet the requirement and as such he held that the clause was not *in terrorem*.[74] However, he also found that because the no-contest clause was broad enough to catch the plaintiff's statutory claim, it contravened public policy and was therefore unenforceable:

> It is a matter of public policy that support and maintenance be provided for those defined individuals and it would be contrary to such policy to allow a testator to circumvent the provisions of the *Wills Variation Act* by the creation of such as para. 9 [the no-contest clause]. It is important to the public as a whole that widows, widowers and children be at liberty to apply for adequate maintenance and support in the event that

72. *Kent (Re)*, *supra*, footnote 69, at p. 319.
73. *Supra,* at p. 321.
74. *Supra,* at pp. 322-3.

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> sufficient provision for them is not made in the will of their spouse or parent. I have concluded that the intent of para. 9 was to prevent any such application. It is not necessary for the purposes of this decision to conjure up scenarios wherein inequitable and distressing results are created for a widow, or children by being deprived of maintenance and support while an "undeserving" beneficiary takes under a will. Paragraph 9 therefore is void as against public policy.[75]

Kent was followed in the more recent decision in *Bellinger v. Nuytten Estate*. In this case the will in issue contained the following forfeiture clause:[76]

> IT IS MY FURTHER DESIRE, because of an expressed intention of one of the legatees to contest the terms of this my Will, that should any person do so then he or she shall forfeit any legacy he or she may be otherwise entitled to.

The plaintiff had already challenged the will on several common law grounds, and had brought a statutory claim pursuant to British Columbia's *Wills Variation Act*. In light of these challenges the question arose as to whether the forfeiture clause was void as being *in terrorem*. Noting the lack of any gift over, Hood J. concluded that indeed it was void:

> While I am satisfied that Dorothy's [*i.e.*, the testator] intention by Clause 7 was to coerce Roy [the plaintiff and a beneficiary] because of his threat to challenge the Will as regards Beverly's [a beneficiary] entitlement to the Pine Street property, I am not satisfied in the circumstances that she intended to do more than threaten him, using the terminology of the cases. And my view with regard to Phil [a beneficiary] is the same. And the lack of the slightest suggestion of any gift over supports my conclusion. Clause 7 then being in *in terrorem* is clearly void at Common Law as against both men.[77]

In addition, and again following *Kent*, Hood J. found that the clause was broad enough to catch the applicant's statutory claim and therefore, in addition to being *in terrorem* and therefore unenforceable, it was also unenforceable as being in breach of public policy:

> I do agree with Mr. Todd's submission that Clause 7 is invalid at Common Law, and cannot be enforced by the Court, because of the lack of a provision for a gift over of the benefits in the event of their being forfeited as a

75. *Supra,* at p. 323.
76. *Bellinger v. Nuytten Estate, supra*, footnote 5, at para. 2.
77. *Supra,* at para. 22.

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> result of a breach of the Clause; that the Clause is void as well with regards to Roy's *Wills Variation Act* claim in that it is against public policy.[78]

It is apparent that the rule against *in terrorem* clauses is very much a part of the Canadian law of wills. The Canadian version of the rule appears to be similar, in all significant respects, to the English rule. The main features of the Canadian rule can be summarized as follows:

1. A forfeiture provision which does not include a gift over will be judged to be a mere threat and therefore unenforceable.
2. This requirement applies to bequests of personalty or to bequests involving a mixed or massed fund representing both personalty and realty.
3. This requirement only applies to conditions in partial restraint of marriage or to no-contest conditions.

5. The Gift Over Requirement

It will be clear from the foregoing that the defining feature of the rule against *in terrorem* clauses is the requirement that the condition include a gift over. If a gift over is attached, the condition will usually be held to be enforceable; if a gift over is absent, the condition will usually be held to be unenforceable.

Given its centrality, the question arises as to the purpose of the gift over: should it be understood as a principle of substantive law, or as an evidentiary principle — a means of construing the testator's intention.[79] Opinion on this question has long been divided. In *Harvey v. Ashton*, Willes L.C.J. suggested that the *in terrorem* rule was "laid down as a rule to construe the testator's intention", the gift over serving as one, though possibly not the only, means by which a testator could make clear his intention that the condition should be effective.[80] An entirely different view was set out in *Wheeler v. Bingham*.[81] Lord Hardwicke L.C. suggested that the true focus of the *in terrorem* rule was the alternate legatee, the gift over therefore existing, first and foremost, as a contingent right:

> There have been abundance of cases here, where the intention of the testator was full as strong that the legacy should cease . . . and yet the intention only did not prevail . . . The true ground upon which this court

78. *Supra,* at para. 21.
79. In *Bellinger v. Nuytten Estate, supra*, footnote 5, at para. 10, Hood J. framed the question as follows: " There seems to be a difference of opinion as to the basis of the rule, whether it is a rule of law or a rule of construction . . ."
80. *Harvey v. Ashton (or Aston) (Lady)* (1737), 1 Atk. 361 at p. 377, 26 E.R. 230.
81. (1746), 3 Atk. 364, 26 E.R. 1010.

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> has suffered the condition to *effectuate*, is not the intention, but the right of a *third person*, the being given over, and vesting in that third person, if the condition is not performed. [Emphasis in original.][82]

In its decision in he leading case of *Leong v. Lim Beng Chye*,[83] the Privy Council appears to have favoured the evidentiary explanation. However, for the record, it remained noncommittal:

> No doubt it is quite satisfactory to say that, if the will contains an express gift over, that gift shows beyond doubt that the testator did not intend that the condition should be merely *in terrorem*. But it is equally satisfactory and perhaps less complicated an approach, to follow Lord Hardwicke in saying that it is the presence in the will of the express gift over that determines the matter in favour of the forfeiture.[84]

Despite this formal indecision, the cases appear, on balance, to favour the evidentiary conceptualization of the gift over. That being the case, the possibility arises that a forfeiture condition might be enforced even in the absence of a gift over, so long as there is some other satisfactory evidence of the testator's earnestness. This possibility was noted in *Re Catt's Trusts*, in which Vice-Chancellor Page Wood noted that "[i]t is quite clear that if a testator desires a gift to be revoked the mere fact that there is no gift over will not prevent the revocation from taking effect."[85] The possibility was embraced in *Re Hanlon* in which the court, even in the absence of a gift over, construed the testator's intention to be, as the will explicitly provided, that forfeiture should follow upon a breach of the condition: " On the construction of the will before me it is, I think, clear that the testator intended the gift to his daughter to be revoked on breach of any of the conditions, and if this is right the absence of any gift over cannot be material here."[86]

However, if it is accepted that the gift over is to be conceptualized as a means of construing the testator's intention, further difficulties arise. In the first place, in the absence of a gift over, what other evidence might a court consider in determining whether a testator, in providing for a forfeiture, was truly in earnest. No clear answer arises from the cases, though in its decision in *Leong v. Lim Beng Chye* the Privy

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82. *Supra,* at p. 367. Several other decisions adopted a similar position. In *Cleaver v. Spurling*, *supra*, footnote 26, at p. 528, the court noted: "When the legacy is once vested in the devisee over, equity cannot fetch it back again."
83. *Leong v. Lim Beng Chye, supra*, footnote 4.
84. *Supra,* at p. 662.
85. *Re Catt's Trusts* (1864), 2 H. & M. 46 at p. 52, 71 E.R. 377.
86. *Re Hanlon*, *supra*, footnote 30, at p. 260.

Council was quick to reject the suggestion that a court might look beyond the four corners of the will:

> . . . in so far as the rule is rested on intention, their Lordships do not feel any doubt that the intention relied upon must be found within the four corners of the will itself and extracted from the contents of the will. To introduce any method of ascertaining the intention which goes beyond this and allows it to be found or guessed at from extraneous circumstances or on a balance of probabilities is to introduce a principle which is foreign to the very basis of testamentary construction.[87]

The second difficulty is more fundamental. Here one asks why the gift over should have this peculiar evidentiary significance in the first place. If a testator states, with ordinary clarity, that she wishes a gift to be forfeit in the event her will is contested, why should the court begin by doubting her intent; and why should it then accept her intent if it finds a gift over at the end of the of the clause? The apparent absurdity of the requirement was noted by the Privy Council in *Leong v. Lim Beng Chye*:

> . . . [A]n explanation that is based on the testator's presumed intention does not offer any satisfactory answer to the query why, in that case, adequate evidence of serious intention is not provided by the very condition that the legacy is to be forfeited; a condition which, in the case of realty, effectively performs its apparent purpose.[88]

Skepticism grows once one recalls that the *in terrorem* rule only applies to certain conditions but not others, and that it only applies to gifts of personalty and mixed funds but not to gifts of realty. Echoing the Privy Council's comments in *Leong v. Lim Beng Chye*, one asks why should a court doubt the intent of a testator who makes a gift of personalty but not the intent of a testator who makes a gift of realty; and why should a court doubt the intent of a testator who includes a no-contest condition, or a condition in partial restraint of marriage, but not some other condition?

Finally, skepticism becomes complete once one notes that the gift over requirement does not, in itself, necessarily entail any clear demonstration of testator intent. Both English and Canadian authorities agree that although a general residuary gift is insufficient,[89] the testator

87. *Leong v. Lim Beng Chye, supra*, footnote 4, at pp. 662-63.
88. *Supra,* at pp. 661-62.
89. *Wheeler v. Bingham, supra,* footnote 81, at p. 367; *Bellinger v. Nuytten Estate, supra*, footnote 5, at para. 9.

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need not specifically name an alternate legatee. It will be enough if the condition in issue simply states that in the event of a breach, the gift is to fall into residue.[90]

In the end, and assuming that its purpose is to evidence testator intent, I would suggest that the requirement of a gift over is insufficient to its purpose.

6. The Value of the Rule Considered

In addition to questioning the efficacy, even rationality, of the gift over requirement, I would suggest that there are other reasons for re-thinking the *in terrorem* rule. Most importantly, the rule arguably serves no sensible purpose. This is perhaps clearest in the case of the first branch of the rule — that applicable to conditions in partial restraint of marriage. Here one asks, quite simply, why should the courts intervene? As has been noted, conditions which amount to an absolute or even unreasonable restraint on marriage are already dealt with by the public policy principle, and under that heading, where appropriate, will be judged to be void.[91] Does the public have sufficient interest in *partial* restraints on marriage to warrant subverting the cardinal principle of deference to testator intention through an appeal to the *in terrorem* rule? Arguably, no. It is true that in particular cases concerns about the formulation of a condition may arise. But rather than relying on the *in terrorem* rule, a more sensible might be simply to adjust the margins of the public policy doctrine.

Much the same thing can be said about the second branch of the *in terrorem* rule — that applicable to no-contest conditions. As has been noted, the doctrine of public policy already provides that

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90. In *Kent (Re), supra*, footnote 69, at p. 322, the British Columbia Supreme Court held as follows:

> In this instance is such a "threat" idle? Ordinarily if a provision which contains such a condition is followed by a gift over in the event of a breach of that condition, the condition is held to be valid: *Jarman A Treatise on Wills*, 5th ed. (1893), p. 1255. While certain authorities question whether a gift over is always necessary, I have concluded in this instance that para. 9 of the testator's will creates a gift over. The words "I DIRECT that said benefits so revoked shall fall into and form part of the residue of my Estate" are sufficient to constitute a gift over for the purpose of meeting the *in terrorem* doctrine. Therefore the paragraph is valid and not subject to the doctrine, even if para. 9 does not completely deprive the court of jurisdiction. However, by depriving the petitioners of their right to apply for relief under the *Wills Variation Act*, para. 9 may be invalid as a provision which is contrary to public policy. [Emphasis added.]

91. See *Re Cutter*, *supra*, footnote 61; *Re Haythornthwaite, supra*, footnote 61. See also MacKenzie, *op. cit.*, footnote 1, at paras. 16.57*ff*.

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conditions may not oust the jurisdiction of the courts, nor may they prevent a beneficiary from bringing a claim pursuant to the applicable dependents' relief legislation.[92] Within the boundaries defined by these requirements, why should a testator not be allowed to insulate her will from litigation? Beyond the issues identified by the doctrine of public policy, the public arguably has no necessary interest in the complaints of beneficiaries. In his decision in 1846 in *Cooke v. Turner*, in upholding the enforcement of a no-contest condition, Baron Rolfe weighed the contending interests in a manner which continues to hold appeal.[93] Having discussed some fact situations he continued:

> The truth is, that in none of these cases is there any policy of the law on the one side or the other . . . It matters not to the state whether the land is enjoyed by the heir or the devisee; and we conceive, therefore, that the law leaves the parties to make just what contracts and what arrangements they may think expedient, as to the raising or not raising questions of law or fact among one another, the sole result of which is to give the enjoyment of property to one claimant rather than another.[94]

It is true that beneficiaries must be allowed to contest a will in appropriate circumstances. And it is equally true that there is a public interest in ensuring testamentary legality and propriety. However, once again it is suggested that the *in terrorem* rule, with all its absurdities, is no solution. It is suggested that a better solution is that adopted by the majority of American jurisdictions. Under this approach a no-contest clause would be viewed as prima facie enforceable regardless of whether or not a gift over is included. At the same time, an exception to this rule would be recognized. Beneficiaries who are otherwise bound by the condition would nonetheless be allowed to challenge the will where they have done so with "probable cause".[95] Such an approach would arguably strike a proper balance between the principle of deference to testator intention, on the one hand, and the public's legitimate interest in testamentary propriety on the other.

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92. In his "Forfeiture Clauses in Wills" (Todd, *op. cit.*, footnote 68, at p. 65), Trevor Todd summarizes this aspect of the ratio in *Bellinger* as follows: "A Will provision providing for forfeiture if the Will is contested is ineffective in so far as it relates to a claim under the *Wills Variation Act*. It is void as contrary to public policy as it attempts to prohibit valid statutory claims."
93. *Cooke v. Turner, supra,* footnote 26.
94 . *Supra,* at pp. 734-36.
95. As to the meaning of "probable cause", it seems to me that the approach suggested in the American case law, and discussed above, may be appropriate: probable cause exists if the plaintiff reasonably believes in the existence of facts

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7. Conclusion

The rule against *in terrorem* conditions is alive and well within the Canadian law of wills. Under this rule a forfeiture condition which does not include a gift over may be held to be a mere threat, and as such unenforceable. The possibility exists that a court might invoke the rule in the absence of a gift over, on the basis of some other evidence that the testator did not really intend the forfeiture; however, on the basis of the existing case law it is difficult to suggest precisely what type of evidence this might be. The rule is only applicable to no-contest conditions and to conditions in partial restraint of marriage. Further, the rule will not apply where the gift in issue is a devise of real property.

Despite its apparent vitality the question arises as to whether the *in terrorem* rule serves any useful purpose. The rule originated as a legal fiction designed to bridge the doctrinal gap between two courts, neither of which has any role in our present legal system. The central feature of the rule — the gift over — is difficult to explain, and even more difficult to justify. The principles which define the scope of the rule — its restriction to no-contest conditions and conditions in partial restraint of marriage, as well as its restriction to gifts of personalty — owe more to history than they do to logic or public policy. In the end, it is difficult to see the rule, as presently formulated, as serving any useful purpose. Although altering principles upon which testator's have relied can be dangerous, it is suggested that some thought should be given to abandoning the *in terrorem* rule, whether by appellate decision or legislative change, and to replacing it with a presumption that forfeiture clauses which are otherwise enforceable and not contrary to public policy should be enforced, subject, in the case of no-contest conditions, to a beneficiary's right to contest a will for probable cause.

upon which her claim is based and reasonably believes that under such facts the claim may be valid at law. The fact that the plaintiff acted in reliance on advice received from counsel should ordinarily be enough to satisfy the latter requirement.