
How to Break Through a "No-Contest Clause" in a Will or Trust in Michigan

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After much thought and consideration, Alice decided to update her Last Will and Testament to change the amounts her two sons, Bob and Charles, will receive upon her death. Instead of dividing her estate equally between Bob and Charles, as she had in prior versions of her Will, Alice decides to leave 70% of her estate to Bob and 30% to Charles. Alice loves both of her sons very much, but Bob has fallen on hard times, and Alice believes Charles will not need the distribution from her estate as much as Bob.

After Alice's death, Charles reviews his mother's Will and discovers that, yet again, his older brother, Bob, is being favored. Charles thinks he deserves at least 50% of his mother's estate, which he would be entitled to under Michigan law had Alice died without a Will. Charles immediately contacts his attorney to see if he can challenge his mother's Will. Luckily for Bob, Alice included the following language in her Will:

"If any beneficiary contests my Last Will and Testament, then that beneficiary will forfeit all rights and interests of every kind and nature he or she might otherwise have under this Will and the forfeited interests will be added proportionately to the shares of my other beneficiaries who did not participate in such acts or proceedings to contest my Last Will and Testament."

Charles' lawyer explains that this is an "*in terrorem*" clause, also known as a "no-contest" clause. Because of this clause, if Charles moves forward with contesting the Will, he could forfeit his 30% interest in his mother's estate, and everything would then go to Bob.

Charles is out of luck -- or is he? While no-contest clauses in Wills and Trust Agreements are enforceable in Michigan, there are some instances where a beneficiary can still challenge a Will or Trust, despite a no-contest clause, without running the risk of forfeiting his or her entire interest under the governing document. In order to determine if legal action is advisable, one must first understand what a no-contest clause is and to what extent a beneficiary can challenge a Will or Trust in Michigan if the document contains a no-contest clause.

What is a "no-contest" clause?

A no-contest clause is a clause which may be included in a Last Will and Testament or a Trust Agreement and generally provides that if a beneficiary contests any provision of the Will or Trust, that beneficiary will forfeit any interest he or she has in the estate or trust property. The clause is used as a mechanism to deter beneficiaries from challenging the governing document and spending time and resources on litigation to recover a larger sum from the estate or trust.

The penalty for challenging the document is generally a forfeiture of all or part of the challenger's interest under the document. Thus, a no-contest clause will be effective to deter only those persons who are beneficiaries under the Will or Trust and will have no deterrent effect on other individuals who were omitted altogether from the Will or Trust. No-contest clauses are often referred to as "*in terrorem*" clauses as they are meant to instill terror in the beneficiary who considers challenging the document.

Are these clauses enforceable in Michigan?

No-contest clauses are enforceable in Michigan under a Will or Trust agreement to the extent that the challenger lacks "probable cause" for instituting a proceeding to contest the document.¹ Michigan statutes, therefore, create an exception to the enforceability of no-contest clauses. If the challenger lacks "probable cause" to support his or her challenge, the clause will be valid and enforceable, and the challenger will be penalized according to the clause. However, if the challenger has probable cause to challenge the will or trust, he or she may bring an action in the appropriate probate court, with no risk of losing his entire gift.

The determination as to whether probable cause exists to challenge a Will or Trust is a fact-specific, legal determination that must be made by the court in which the action is filed. Michigan courts find probable cause to exist when "at the time of instituting the proceeding, there was evidence that would lead a reasonable person, who is properly informed and advised, to conclude that there was a substantial likelihood that the challenge would be successful."² Satisfaction of this standard does not require the challenger to have all of the evidence he or she needs for a successful contest of the Will or Trust. Instead, it merely requires a substantial likelihood of success based on what is known at the time the proceeding is commenced.³

Furthermore, Michigan courts require that no-contest clauses always be strictly construed,⁴ as they are considered to be forfeiture clauses. In application, such clauses are narrowly construed to avoid forfeiture, if possible; meaning, a beneficiary triggers the no-contest clause only when his or her actions are explicitly prohibited by the terms of the no-contest clause.⁵

I think I have probable cause to contest a Will or Trust...now what?

The strict interpretation of no-contest clauses by Michigan courts combined with the probable cause standard generally sets an attainable threshold for a beneficiary who reasonably believes, based on the evidence available to the beneficiary, that a challenge to the Will or Trust would be successful. A beneficiary may have probable cause to contest a Will or Trust if:

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- The Will or Trust does not conform with formal requirements set forth under Michigan law;
 - The Testator of the Will or Settlor of the Trust lacked testamentary capacity at the time of execution;
 - The Will or Trust was the result of "undue influence" by a third party or there is a "presumption of undue influence" established;
 - The creation of the Will or Trust was induced by fraud or misrepresentation;
 - The creation of the Will or Trust was induced by coercion or duress;
 - The Will or Trust is a forgery; or
 - The creation of the Will or Trust was the result of a mistake of fact.

The legal process to contest a Will or Trust that contains a no-contest clause can be rather complex and time-sensitive; proper steps must be taken to avoid a forfeiture. A preliminary determination by counsel will need to be made to determine whether a beneficiary indeed has probable cause to contest the governing document. If probable cause is likely, legal action in probate court is required to establish probable cause and to actually contest the Will or Trust. The assistance of an experienced attorney is essential in order to provide the guidance, advice and expertise necessary to navigate these probate court proceedings. For a consultation with a Clark Hill attorney regarding this or any probate litigation matter, please contact Thomas E.F. Fabbri, Mallory A. Kallabat, Jonathan M. Martone, Nicholas E. Papisifakis, or another member of Clark Hill's Estate Planning & Probate Litigation practice group.

¹ Michigan Compiled Laws ("MCL") §§ 700.2518, 700.3905, and 700.7113

² In re Estate of Stan, 301 Mich.App 435, 445; 839 NW2d 498 (2013)

³ Restatement 3d of Property (Wills and Other Donative Transfers), § 8.5

⁴ In re Miller Osborne Perry Trust, 299 Mich App 525, 831 NW2d 251 (2013)

⁵ See Saier v. Saier, 366 Mich. 515, 520, 115 N.W.2d 279, 282 (1962)