

VOICE, STRENGTH, AND NO-CONTEST CLAUSES

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[H]is will was read, and like almost every other will, gave as much disappointment as pleasure.

—Jane Austen¹

The will is a unilateral written disposition of probate property to be effective upon the will-maker’s death. To have any legal effect, however, the will-maker’s family, beneficiaries, and personal representatives, along with the probate court, need to implement the will provisions. To buttress the strength of the will, the language of the will is definitive, certain, and strong. But when the will relies upon standardized language, the voice of the will-maker is flattened or even non-existent. The absence of the will-maker’s voice may jeopardize the legal effect of the will.

This Article argues that the over-reliance on “time-tested” formulaic language endows the will with a mechanical, masculine voice that is ill-fitting for most testators and does not advance the goals of testators. Specifically, this Article will focus on the use and language of the no-contest clause. Will-makers and will-drafters have long abandoned the language of *in terrorem* clauses that threaten eternal damnation for anyone who seeks to alter the terms of the will. The replacement language uses false strength to intimidate beneficiaries by referencing a potential forfeiture of a testamentary gift. The standard no-contest clause has continuing appeal to testators and drafters, despite concerns raised about the flattening of the testator’s voice and provocative nature of the language.

This Article argues that the value of the no-contest clause is undermined by the generic, hollow language replicated in form no-contest clauses. Rather than discouraging will contests, the language may actually encourage will contests. To support this argument, this Article first sets the concept of voice in the context of testamentary language. This Article next examines the purpose, structure, appeal, and concerns of the no-contest clause. Then, this Article reviews how courts, focusing particularly on cases decided across the country within the last five years, have interpreted the language in no-contest clauses. This Article concludes by emphasizing how the reliance on “time-tested” formulaic language perpetuates stereotypes, most specifically gender stereotypes, and inhibits drafting innovation. After all, a will is more than a mere legal instrument that transfers widgets and greenacres. The voice in the will should be authentic and genuine.

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1. JANE AUSTEN, *SENSE AND SENSIBILITY* 4 (2006).

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INTRODUCTION

A will is more than a mere legal instrument that transfers widgets and greenacres. To create a will, a person must reflect upon his or her life’s choices, tally his or her monetary value, and assess his or her relationships with people and organizations. All of this planning is done in the shadow of confronting mortality and contemplating a legacy. This personal reflection and contemplation is reflected in a document that often reads generic and inauthentic. For, despite the extensive self-referencing, the language of a typical will bears little connection to a personal voice of the testator. In striving to be substantively accurate and legally operative, the drafter and form documents flatten the voice of the document into a monotonous amalgamation of stock phrases and standard provisions.

This Article argues that the reliance on “time-tested” formulaic language endows the will with a mechanical, masculine voice that is ill-fitting for most testators and does not advance the goals of testators. Specifically, this Article will focus on the use and language of the no-contest clause. This Article argues that the value of the no-contest clause is undermined by the generic, hollow language replicated in form no-contest clauses. Rather than discouraging will contests, the language may actually encourage will contests. To support this argument, this Article first sets the concept of voice in the context of testamentary language. This Article next examines how the clause operates, the appeal of the clause to both testators and drafters, and the concerns raised by the standard no-contest clause. Then, this Article reviews how courts, focusing particularly on cases decided within a five year period, have interpreted no-contest clauses. This Article concludes by emphasizing how the reliance on “time-tested” formulaic language perpetuates stereotypes, most specifically gender stereotypes, and inhibits drafting innovation.

I. WILLS AND VOICE

Black's Law Dictionary defines a will as a “document by which a person directs his or her estate to be distributed upon death.”² More specifically, a will may be defined as a unilateral, revocable written declaration of the disposition of probate property.³ That description, specifically the word “declaration,” exposes the number of conditions that must occur before a will has a legal effect. A will has legal effect if all of the following seven events occur:

1. the will is properly created
2. the will is not properly revoked
3. the will's existence is known to someone other than the testator
4. the will is located after the testator's death within a set period of time
5. the will, or what more accurately what purports to be the will, is submitted to the relevant probate court
6. the purported will is admitted to the probate court as the valid will
7. the testator dies owning probate property.⁴

Even if all of these conditions occur, the language of the will may not have the legal effect anticipated by its testator—at least not in its entirety. The language of the will may be modified by the court upon a construction proceeding. The personal representative has the ability to settle claims made against the estate, which may operate to alter the terms of the will.⁵

To have any legal effect, however, the will-maker's family, beneficiaries, and personal representatives, along with the probate court, need to implement the provisions. Perhaps then the more appropriate definition of will from *Black's Law Dictionary* is “[w]ish; desire; choice.”⁶ Essentially, the language of the will is a series of requests that will hopefully be followed. This understanding can be seen with the title sometimes attributed to the will: last wishes. To

2. *Will*, BLACK'S LAW DICTIONARY (8th ed. 2004) (second definition of the term “will”).

3. Karen J. Sneddon, *Speaking for the Dead: Voice in Last Wills and Testaments*, 85 ST. JOHN'S L. REV. 683, 685 (2011).

4. MARY F. RADFORD, REDFEARN WILLS AND ADMINISTRATION IN GEORGIA §§ 3:1–3:3 (2017-2018 ed.).

5. The proposed settlement may need to be approved by the probate court. *E.g.*, UNIF. PROBATE CODE § 3-1102 (amended 2010).

6. *Will*, BLACK'S LAW DICTIONARY (8th ed. 2004) (referencing the first definition of the term “will” and placed in the context of “employment at will”).

buttress the strength of the provisions, the language of the will is definitive, certain, and strong. But when the language relies upon standardized language, the voice of the will-maker is missing. The absence of the will-maker's voice may jeopardize the legal effect of the will.

Conceptualizing the will as a series of wishes references the concept of voice and provides a technique for the testator to persuade the audience of the will to follow the wishes expressed in the will. All communications, whether written or oral, have a voice. Voice is the sound or sense of the speaker conveying the communications.⁷ Peter Elbow, renowned composition studies professor and scholar, summarizes the effect of voice as follows: "Writing *with voice* is writing into which someone has breathed. It has that fluency, rhythm, and liveliness that exist naturally in the speech of most people when they are enjoying a conversation."⁸ Aligning the language of the will with the testator's own voice does not mean injecting precatory language⁹ or ambiguous language. Aligning the voice of the will with the testator's voice can be achieved by customizing the order of provisions, personalizing the descriptions of tangible personal property, using both full legal names and nicknames to identify beneficiaries, and removing outdated legalese.¹⁰

Voice becomes a technique to increase the persuasiveness of a document.¹¹ Persuasion refers to influencing a person to undertake or refrain from undertaking a particular action.¹² In the context of the will, the language of the will aims to persuade the testator's family members, beneficiaries, and personal representatives to follow the wishes as

7. See, e.g., J. Christopher Rideout, *Voice, Self, and Persona in Legal Writing*, 15 LEGAL WRITING 67, 68 (2009); Darsie Bowden, *Voice*, in CONCEPTS IN COMPOSITION: THEORY AND PRACTICE IN THE TEACHING OF WRITING 285, 291–92 (Irene L. Clark ed., 2003); DARSIE BOWDEN, THE MYTHOLOGY OF VOICE 61 (Charles I. Schuster, ed., 1999); Kathleen Blake Yancey, *Introduction: Definition, Intersection, and Difference—Mapping the Landscape of Voice*, in VOICES ON VOICE: PERSPECTIVES, DEFINITIONS, INQUIRY vii, ix (Kathleen Blake Yancey, ed., 1994).

8. PETER ELBOW, WRITING WITH POWER: TECHNIQUES FOR MASTERING THE WRITING PROCESS 299 (1981). For an examination of judicial writing and voice, see Andrea McArdle, *Understanding Voice: Writing in a Judicial Context*, 20 LEGAL WRITING 189 (2015).

9. Alyssa A. DiRusso, *He Says, She Asks: Sex, Language, and the Law of Precatory Words in Wills*, 22 WIS. WOMEN'S L.J. 1, 2 (2007).

10. Sneddon, *supra* note 3, at pt. III.B.

11. See, e.g., Julius Getman, *Voices*, 66 TEX. L. REV. 577, 577, 582 (1988) (exploring the concepts of "human voice" and "professional voice").

12. For a survey of social science studies relating to persuasion and the potential applicable to legal writing, see Kathryn M. Stanchi, *The Science of Persuasion: An Initial Exploration*, 2006 MICH. ST. L. REV. 411. See also Kathryn Stanchi, *Persuasion: An Annotated Bibliography*, 6 J. ASS'N LEGAL WRITING DIRECTORS 75, 75–76 (2009) (creating a bibliography of persuasion and legal writing).

outlined. Relatedly, the language aims to dissuade the disregarding of those wishes.

The genuineness of the voice, the authenticity of the voice, and the strength of the voice affects the purpose of the document. For instance, voice affects how the audience engages with the document. Voice will affect how the document is interpreted and ultimately, the document legally operates. In the context of wills, voice offers the ability of the testator to identify with the document. The will is phrased as a first person narrative, but the testator may see little reflection of the testator's perspective, concerns, and hopes in a document crammed with stock phrasing.¹³ Increasing the testator's ability to identify with and to connect to the document promotes testator engagement. This engagement encourages the testator to understand the legal and non-legal implications of the terms.¹⁴ This engagement can also encourage the testator to share the terms with others—rather than “surprise” family, friends, and the beneficiaries with the terms after death.¹⁵ The voice will influence how beneficiaries react to the document. Whether the beneficiaries recognize the voice or not may affect the beneficiaries' willingness and the willingness of the testator's family to follow the instructions or to object to the terms of the will. How the court interprets the will to determine intent¹⁶ will also be influenced by the voice in the document.¹⁷ The testator needs the beneficiaries, family members, and the court to implement the terms to give the will its intended legal effect.

Litigation involving a will is not uncommon.¹⁸ According to one scholar, “some 60 to 70 percent of all Roman civil litigation seems to

13. See generally Deborah S. Gordon, *Mortality and Identity: Wills, Narratives, and Cherished Possessions*, 28 *YALE J.L. & HUMAN.* 265 (2016); Karen J. Sneddon, *The Will as Personal Narrative*, 20 *ELDER L.J.* 355 (2013).

14. See generally Sneddon, *supra* note 3.

15. See, e.g., Louis S. Harrison, *Defensive Strategies for Potential Will and Trust Contests*, *PROB. & PROP.* Nov.–Dec. 1999, at 6, 10 (“Will and trust challenge cases often have one fact in common. The beneficiaries are surprised and angered over the client's decision.”).

16. For an analysis of testamentary intent, see Mark Glover, *A Taxonomy of Testamentary Intent*, 23 *GEO. MASON L. REV.* 569 (2016).

17. “A will is authentic when the decedent intended it to be a legally effective expression of her intended testamentary gifts. If a will is authentic, the court should grant probate so that the decedent's intent is fulfilled” Mark Glover, *Probate-Error Costs*, 49 *CONN. L. REV.* 613, 625 (2016).

18. E.g., Leon Jaworski, *The Will Contest*, Address Delivered to American College of Trial Lawyers (April 16, 1958), in 10 *BAYLOR L. REV.* 87, 88 (1958) (“It has been said, and I think accurately, that a will is more apt to be the subject of litigation than any other legal instrument. To say the least, it is an instrument frequently made the subject of litigation.”).

have arisen over problems connected with succession on death.”¹⁹ That litigation includes filings about nomination of fiduciaries, actions by the fiduciaries, construction proceedings—and will contests.²⁰ Just how many wills are contested is subject to debate.²¹ While a will contest may not occur with the frequency worried by testators, wills contests that do occur are messy and costly.²² Other types of litigation related to the will, such as construction proceedings, may be much more common than the will contest. Nonetheless, drafters need to anticipate what litigation may arise and how to resolve those issues without disrupting a testator’s estate plan.²³ The no-contest clause is one option for the drafter and the testator to consider. But the clause will not necessarily address the problem. As was spoken by Henry W. Taft in a 1921 address to the Association of the Bar of the City of New York, “Even the aid of legal skill of the highest order cannot give [the testator] the consolation that his [or her] memory will not be marred by unseemly disclosure of his [or her] foibles and weaknesses.”²⁴

II. NO-CONTEST CLAUSES

No-contest clauses are also referred to as *in terrorem* clauses.²⁵ The term “*in terrorem*” is Latin for the phrase “in order to frighten.”²⁶

19. EDWARD CHAMPLIN, FINAL JUDGMENT: DUTY AND EMOTION IN ROMAN WILLS, 200 B.C.-A.D. 250 7 (Univ. of Cal. Press ed., 1991).

20. For a detailed presentation of the mechanics of filing a will contest, see Joyce Moore, *Will Contests: From Start to Finish*, 44 ST. MARY’S L.J. 97 (2012).

21. *E.g.*, John H. Langbein, *Will Contests*, 103 YALE L.J. 2039, 2042 n.5 (1994) (asserting that with millions of wills probated, only one in one hundred is contested). An empirical study analyzed probate records in one county in Tennessee from 1976 to 1984. Jeffrey A. Schoenblum, *Will Contests-An Empirical Study*, 22 REAL PROP. PROB. & TR. J. 607, 608 (1987). The study concluded that “the likelihood of any will being contested is extremely attenuated.” *Id.* at 615. The study’s author posited that will contests occurred “perhaps on the order of one in one hundred or so cases.” *Id.* at 614.

22. The concern about delay in the settlement of the estate and the expense of litigation can encourage the settlement of will contests. As one hornbook warns, this concern “may force a settlement even when a contest has no merit.” WILLIAM M. MCGOVERN, SHELDON F. KURTZ, & DAVID M. ENGLISH, WILLS, TRUSTS AND ESTATES INCLUDING TAXATION AND FUTURE INTERESTS 643 (4th ed. 2010).

23. For a summary of thirteen recommendations for estate planners when a will contest or trust litigation is anticipated, see Elaine M. Bucher, Michael D. Simon, & Alyse M. Reiser, *The Best Defense is a Good Offense*, TR. & EST., Mar. 2013, at 17, 18–21.

24. Henry W. Taft, Comments on Will Contests in New York, Address delivered at a meeting of the Association of the Bar of the City of New York (Jan. 13, 1921), in 30 YALE L.J. 593, 606 (1921).

25. Historically, there appears to have been a distinction between an *in terrorem* clause, which was solely a threat, and a no-contest clause, which provided for the forfeiture of a contesting party’s testamentary gift. George A. Slater, *In Terrorem*

This Latin translation emphasizes one of the goals of the clause: to frighten away a potential will contest.²⁷ The no-contest clause is also described as a forfeiture clause or a penalty clause.²⁸ These terms reference how the clause will frighten a beneficiary. If a beneficiary contests the validity of any portion of the will, the clause provides that the beneficiary shall forfeit his or her testamentary gift. If the will contest is successful and the purported will is not admitted to probate, the clause will have no legal effect.²⁹ The beneficiary would then take a testamentary gift under a prior properly executed will or receive an intestate share via the applicable state intestate statute.

The clause thus operates to put pressure on the beneficiary's decision to contest the will in order to potentially receive a higher gift than provided for in the will—or lose the testamentary gift entirely. As one author states,

the clause operates as a settlement offer from the testator to a beneficiary of a lesser benefit than the amount the beneficiary would receive under the state intestacy scheme. This offer is made in the hope that the disappointed beneficiary will accept the smaller benefit, rather than risk an all-or-nothing gamble by contesting probate.³⁰

The no-contest clause should not be confused with the statement of disinheritance.³¹ Although similar, strong language may be used in both provisions, the purposes of the two provisions are different. The statement of disinheritance is a recitation of individuals who are not receiving any gifts under the will or who are given nominal gifts, such as gifts of one dollar. The following is an example from a recent case:

Clauses in Wills, 5 *FORDHAM L. REV.* 1, 1 (1936); see also Peter G. Lawson, *The Rule Against "In Terrorem" Conditions: What Is It? Where Did It Come from? Do We Really Need It?*, 25 *EST. TR. & PENSIONS J.* 71 (2006); W. Harry Jack, *No-Contest or In Terrorem Clauses in Wills—Construction and Enforcement*, 19 *SW. L.J.* 722, 722–23 (1965).

26. *In Terrorem*, *BLACK'S LAW DICTIONARY* (8th ed. 2004).

27. No-contest clauses may also be referred to as noncontest clauses or anticontest clauses. *No-Contest Clauses*, *BLACK'S LAW DICTIONARY* (8th ed. 2004).

28. UNIF. PROBATE CODE § 2-517 (amended 2010).

29. JEFFREY N. PENNELL & ALAN NEWMAN, *ESTATE AND TRUST PLANNING* 62 (ABA 2005).

30. Dawn Koren, Note, *No-Contest Clauses: Settlement Offers from the Grave*, 12 *PROB. L.J.* 173, 173 (1995).

31. A negative will should be considered a statement of disinheritance. See Frederic S. Schwartz, *Models of the Will and Negative Disinheritance*, 48 *MERCER L. REV.* 1137, 1137 (1997).

“I leave my son, Paul, my love and affection but nothing more knowing that he is financially able to care for himself and his family.”³²

One of the main purposes of a statement of disinheritance is to clarify that the testator did not unintentionally omit the named individuals.³³ This prevents the individual from claiming a pretermitted heir’s share.³⁴ A statement of disinheritance may sometimes include a reason why a particular family member is not receiving a testamentary gift, such as the creation and funding of a lifetime trust for the identified individual.³⁵ Because the identified individual is not receiving a gift under the terms of the will or receiving only a nominal gift, the individual is not dissuaded from filing a contest for threat of losing a testamentary gift. Instead, the personal representatives and the court have a memorialization of the testator’s intent to purposely exclude the named individuals.

Historically, no-contest clauses centered on a threat to invoke terror in the beneficiary. The following is a typical example from an Anglo-Saxon will.³⁶

And he who shall detract from my will which I have now declared in witness of God, may he be deprived of joy on this earth, and may the Almighty Lord who created and made all creatures exclude him from the fellowship of all saints on the Day of Judgment, and may he be delivered into the abyss of hell to Satan the devil and all his accursed companions and

32. *In re Estate of Grutzner*, 46 Misc. 3d 1228(A) (N.Y. Surr. Ct. 2015). The 1993 instrument also included “an in terrorem clause.” The instrument gave all the property to an individual who predeceased the testator. Thus, the testator’s property passed via intestacy with the statement of disinheritance about Paul acting as a negative will. The probate property was distributed as though Paul predeceased the testator. *Id.*

33. See PENNELL, *supra* note 29, at 216.

34. For an analysis of protections for pretermitted children, see generally Adam J. Hirsch, *Airbrushed Heirs: The Problem of Children Omitted from Wills*, 50 REAL PROP. TR. & EST. L.J. 175 (2015).

35. For an analysis of the fictional will of Henry Seth Hubbard from John Grisham’s “Sycamore Row,” see Teri A. McMurtry-Chubb, *The Rhetoric of Race, Redemption, and Will Contests: Inheritance as Reparations in John Grisham’s Sycamore Row*, 48 U. MEM. L. REV. 889, 948–50 (2018).

36. For purposes of this Article, the term “will” is used to refer to the death-bed dispositions of property during Anglo-Saxon times. Such “wills” were not ambulatory. See generally Brenda Danet & Bryna Bogoch, *From Oral Ceremony to Written Document: The Transitional Language of Anglo-Saxon Wills*, 12 LANGUAGE & COMM., Apr. 1992, at 98 (analyzing sixty-two Old English Wills, including the wills in the collection edited by Dorothy Whitelock).

there suffer with God's adversaries, without end, and never trouble my heirs.³⁷

Many commentators trace the modern analysis of no-contest clauses to the 1846 English case of *Cooke v. Turner*.³⁸ The validity of no-contest clauses was then considered by the U.S. Supreme Court in 1898 in *Smithsonian Institution v. Meech*.³⁹ No-contest clauses received much attention in the late 1950s⁴⁰ and 1960s.⁴¹ Part of this mid-century attention may be attributed to the energy derived from the drafting process of the 1969 Uniform Probate Code.⁴² Part of this attention may also be attributed to the recognition by legal academics, practitioners, and judges that the base of testation⁴³ was expanding. More potential testators had more property to pass—some of which would be passed by

37. DOROTHY WHITELOCK, *Will of Wulfgyth, in ANGLO-SAXON WILLS* 87 (AMS Press Inc. New York 1973) (originally published in 1930).

38. Robert E. Kuelthau, *Wills: Validity of No-Contest Clauses in Wills*, 43 MARQ. L. REV. 528, 529 (1960) (referencing *Cooke v. Turner*, 15 M. & W. 727, 153 Eng. Rep. 1044 (1846)).

39. 169 U.S. 398, 411–14 (1898). The relevant testamentary language is as follows:

I bequeath to the sister and brothers of my late wife one thousand dollars (1000) to be equally divided between them. I have already given these last over a thousand dollars which my wife inherited from her father, also clothing and other gifts, thus equalizing substantially my gifts to her family and to mine. These bequests are all made upon the condition that the legatees acquiesce in this will, and I hereby bequeath the share or shares of any disputing this will to the residuary legatee hereinafter named.

Id. at 399.

The English case of *Cooke v. Turner* is cited by the U.S. Supreme Court. *Id.* at 413–14. For an analysis of both *Cooke* and *Smithsonian*, see Jack, *supra* note 25, at 723–25.

40. *E.g.*, Jaworski, *supra* note 18, at 88; Comment, *No-Contest Will Clauses*, 24 U. CHI. L. REV. 762, 762–63 (1957); Note, *Will Contests on Trial*, 6 STAN. L. REV. 91 (1953).

41. *See, e.g.*, Jack, *supra* note 25; *see also* Hugo M. Pfaltz, Jr., “*In Terrorem*” *Ne Terreamus*, 52 KY. L.J. 769 (1964); Herman F. Selvin, Comment, *Terror in Probate*, 16 STAN. L. REV. 355 (1964); Jack Leavitt, *Scope and Effectiveness of No-Contest Clauses in Last Wills and Testaments*, 15 HASTINGS L.J. 45 (1963); Robert C. Reed, Note, *No-Contest Clauses in Wills*, 23 U. PITT. L. REV. 767 (1962).

42. For an examination of the 1969 Uniform Probate Code and the reform movement, see Richard V. Wellman, *Lawyers and the Uniform Probate Code*, 26 OKLA. L. REV. 548, 550–51 (1973); Richard V. Wellman, *The Uniform Probate Code: Blueprint for Reform in the 70's*, 2 CONN. L. REV. 453, 503–04 (1970); Richard V. Wellman, *The Lawyer's Stake in Probate Reform*, 47 MICH. ST. B.J. 10 (1968), reprinted in 9 L. OFF. ECON. & MGMT. 415 (1969); Richard V. Wellman, *The Uniform Probate Code: A Possible Answer to Probate Avoidance*, 44 IND. L.J. 191, 194 (1969).

43. *See, e.g.*, Alyssa A. DiRusso, *Testacy and Intestacy: The Dynamics of Wills and Demographic Status*, 23 QUINNIPIAC PROB. L.J. 36, 41–42, 53 (2009).

testamentary instruments.⁴⁴ More lawyers with varied experiences were drafting more wills.⁴⁵ The expansion may have promoted the re-examination of standard forms and standard language as they proved to be inadequate.

Inclusion of the no-contest clause is known to present at least some risk because the clause, as stated in a 2013 practitioner focused article, “can backfire.”⁴⁶ The no-contest clause is, for that reason, not routinely included in every will that is drafted.⁴⁷ The clause is typically included when the testator or the drafter, as the case may be, anticipates that a will contest may be filed.⁴⁸ The clause’s inclusion may in fact prompt a will contest by acknowledging that the testator or the drafter recognized the possibility that a will contest might be filed. This may inspire the beneficiaries or heirs, as the case may be, to file a will contest.

A. *How the Clause Operates*

The message conveyed in no-contest clauses can be stated as follows: “you get what you get and you don’t get upset.” The testator has provided for the testator’s family, friends, and organizations in a manner that the testator has determined to be appropriate. The family, friends, and organizations should thus respect the testator’s decisions without complaint.

Because testamentary freedom is the touchstone in American succession,⁴⁹ the testator should have the ability to determine who or what receives his or her property.⁵⁰ That includes the ability to provide that no property goes to the testator’s family members. Testamentary freedom is by no means a universally held tenet of succession. Many countries have systems of succession built upon forced succession where particular shares are statutorily proscribed to individuals with

44. See, e.g., Sumner Kenner, *Non-Contesting Clauses in Wills*, 3 IND. L.J. 269, 270 (1928) (positing that client demand was the cause for “more non-contesting clauses inserted in wills written today than ever before”).

45. See *id.*

46. Bucher, Simon, & Reiser, *supra* note 23, at 21.

47. See, e.g., Peter M. Tiersma, *Some Myths About Legal Language*, 2 L., CULTURE & HUMAN. 29, 38 (2006) (criticizing the routine inclusion of no-contest clauses in wills). *But see* Adam F. Streisand & Albert G. Handelman, *No Contests Need to Be Reformed, Not Abolished*, 10 CAL. TR. & EST. Q., no. 3, at 27 (Fall 2004) (“It has become commonplace for estate planners to include a no contest clause in a will or trust to stem the ever increasing tide of internecine warfare.”).

48. See Koren, *supra* note 30.

49. See, e.g., Ashbel G. Gulliver & Catherine J. Tilson, *Classifications of Gratuitous Transfers*, 51 YALE L.J. 1, 2 (1941).

50. See generally Mark Glover, *Freedom of Inheritance*, 2017 UTAH L. REV. 283.

certain legal relationships to the testator.⁵¹ If testamentary freedom is the relevant touchstone, the will should be reflective of the testator's choices. This would mean that no-contest clauses should be enforceable "where it is clear that the trustor (or testator) intended that the conduct in question should forfeit a beneficiary's interest under the indenture (or will)."⁵²

Yet, automatically enforcing all no-contest clauses would undermine testamentary freedom by stifling legitimate will contests.⁵³ In the event that the will does not reflect the choices of the testator, the will should be considered invalid. For those reasons, the grounds for a will contest preserve testamentary freedom. Many jurisdictions have recognized an exception to the enforceability of the no-contest clauses to permit the filing of legitimate will contests.⁵⁴ If the contest is brought in good faith with probable cause, the terms of the no-contest clause will have no legal effect.⁵⁵ As one court observed in 2015, "A good-faith and probable-cause exception to the enforceability of forfeiture clauses in wills is in keeping with the guaranty of all citizens of this state to seek redress for their grievances through due process of law."⁵⁶

The law "abhors forfeiture."⁵⁷ As forfeiture clauses, no-contest clauses will be strictly construed.⁵⁸ Some jurisdictions will never

51. *E.g.*, Ryan McLearn, Comment, *International Forced Heirship: Concerns and Issues with European Forced Heirship Claims*, 3 *EST. PLAN. & COMMUNITY PROP. L.J.* 323, 323–28 (2011).

52. *Cox v. Fisher*, 322 S.W.2d 910, 914 (Mo. 1959); *see also* Leavitt, *supra* note 41, at 64 ("While the wisdom of inserting a forfeiture clause may be open to question, the law does not require that the testamentary distribution be wise or even equitable provided that the testator has clearly expressed his [or her] intention.").

53. *See, e.g.*, *Estate of Stewart*, 286 P.3d 1089 (Ariz. Ct. App. 2012) (considering whether to invalidated a no-contest clause).

54. The most widely recognized exception is the "good faith with probable cause" exception, but other exceptions are recognized by jurisdictions. For example, a jurisdiction may have an exception that permits a beneficiary who is a minor at the time of the testator's death to contest the will without triggering the no-contest clause. *E.g.*, N.Y. § 3-3.5(b) (McKinney 2018); IND. CODE § 29-1-6-2.

55. The Restatement also endorses a good faith-probable cause exception. *RESTATEMENT (THIRD) OF PROPERTY: WILLS AND DONATIVE TRANSFERS* § 8.5 ("A provision in a donative document purporting to rescind a donative transfer to, or a fiduciary appointment of, any person who institutes a proceeding challenging the validity of all or part of the donative document is enforceable unless probable cause existed for instituting the proceeding."). As one scholar explained the need for a good faith-probable cause exception, "respect for the dead must give way to the rights of the living." Selvin, *supra* note 41, at 365.

56. *Parker v. Benoist*, 160 So. 2d 198, 206 (Miss. 2015). *But see* *Sharp v. Sharp*, 447 S.W.3d 622, 626 (Ark. Ct. App. 2014) ("Simply put, Arkansas law does not provide for a good-faith exception for a litigant who files what unquestionably constitutes a will contest.").

57. *See, e.g.*, *Clark v. Bentley*, 76 N.E.2d 438, 411 (Ill. 1997) ("We are further guided by the well-established rule that equity does not favor forfeitures, and in

enforce any no-contest clause because the jurisdiction states that the clause itself violates public policy.⁵⁹ Those jurisdictions consider any restriction on the ability of an interested party to file a will contest to violate public policy.⁶⁰ In order to ensure that wills admitted to probate are authentic and genuine, those jurisdictions want any potential issue to be brought to the attention of the relevant court.

Even when the jurisdiction will generally enforce a no-contest clause, the jurisdiction will automatically enforce a particular clause included in a testator's will. Many jurisdictions require the clause to identify an alternate beneficiary for the forfeited testamentary gift.⁶¹ A jurisdiction may determine that, despite the language used in the particular provision, the no-contest clause will not be triggered when a beneficiary seeks a construction proceeding—even a construction proceeding is to the interpretation of the no-contest clause itself.⁶²

Value exists to minimizing will contests. Will contests may rupture family relationships,⁶³ erode the value of estate assets,⁶⁴ bog down the administration process, tarnish memories, and taint legacies. The no-contest clause is one of many tools⁶⁵ that a testator and a drafter may

construing conditions, both precedent and subsequent, a reasonable construction must be given in favor of the beneficiary.”).

58. *E.g.*, CAL. PROB. CODE § 21304 (“[A] no-contest clause shall be strictly construed.”).

59. For example, a Florida statute, titled “Penalty Clause for Contest,” provides as follows: “A provision in a will purporting to penalize any interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable.” FLA. STAT. § 732.517 (2018).

60. Jurisdictions may also be concerned that the no-contest clause will cause additional litigation with litigation needed to consider the applicability and enforceability of the clauses themselves.

61. O.C. GA. § 53-4-68 (“A condition in terrorem shall be void unless there is a direction in the will as to the disposition of the property if the condition in terrorem is violated, in which event the direction in the will shall be carried out.”). *But cf.* N.Y. § 3-3.5(a) (McKinney 2018) (“A condition qualifying a disposition of property is operative despite the failure of the testator to provide for an alternative gift to take effect upon the breach or non-occurrence of such condition.”).

62. *E.g.*, O.C. GA. § 9-4-4 (cited by *In re Estate of Burkhalter*, 806 S.E.2d 875, 878 (Ga. Ct. App. 2017)).

63. *E.g.*, Daniel Bent, *My Bequest to My Heirs: Years of Contentious, Family Splitting Litigation*, HAW. B.J., Feb. 2004, at 29.

64. *E.g.*, *In re Estate of Muller*, 525 N.Y.S.2d 787, 788 (Sur. Ct. 1988) (describing the aim of the no-contest clause as to “quickly and smoothly settle the decedent's estate without fractious haggling and litigation and without wasting the estate assets”).

65. Other drafting tools include using mediation and arbitration clauses. *See generally* Stephen Wills Murphy, *Enforceable Arbitration Clauses in Wills and Trusts: A Critique*, 26 OHIO ST. J. DISP. RESOL. 627 (2011); Jonathan G. Blattmachr, *Reducing Estate and Trust Litigation through Disclosure, In Terrorem Clauses, Mediation, and Arbitration*, 9 CARDOZO J. CONFLICT RESOL. 237 (2008); Lela P. Love & Stewart E. Sterk, *Leaving More Than Money: Mediation Clauses in Estate Planning Documents*,

consider to minimize the likelihood that a will contest will be filed and that, if filed, minimize the likelihood that the will contest will alter the testator's wishes.

The language in the no-contest clause aims to be comprehensive and definitive with no equivocation.

B. Typical Structure Used

When including a no-contest clause, the clause is typically placed near the end of the will,⁶⁶ nestled among the so-called boilerplate language⁶⁷ The structure used in no-contest clauses follow a typical pattern. The clause does not specify a particular individual but directs the clause to apply to “any beneficiary” or, even more broadly, to “any person.” The clause then lists a number of prohibited acts, those acts that will trigger the forfeiture of individual's testamentary gift. The list of prohibited acts is not limited simply to the filing of a will contest. The clause then recites the consequences: the forfeiture of the gift. The clause then recites how the forfeited gift will be distributed.

The following is a form no-contest clause from a contemporary treatise:

If any beneficiary under this Will contests its validity or the validity of any of its provisions, or institutes any proceeding to prevent this Will or any of its provisions from being carried out in accordance with its terms, whether or not in

65 WASH. & LEE L. REV. 539 (2008); Michael P. Bruyere & Meghan D. Marins, *Mandatory Arbitration Provisions: A Powerful Tool to Prevent Contentious & Costly Trust Litigation, But Are They Enforceable?*, 42 REAL PROP. PROB. & TR. J. 351 (2007); Yolanda Vorys, *The Best of Both Worlds: The Use of Med-Arb for Resolving Will Disputes*, 22 OHIO ST. J. DISP. RESOL. 871 (2007). Roselyn L. Frieding, *Using Mediation to Stem the Tide of Litigation in the Ocean of Family Wealth Transfers*, 59 DISP. RESOL. J. 36 (2004); Donald Gage, John Gromala, & Edward Kopf, *Holistic Estate Planning and Integrating Mediation in the Planning Process*, 39 REAL PROP. PROB. & TR. J. 509 (2004); Susan N. Gary, *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes Over Guardianship and Inheritance*, 32 WAKE FOREST L. REV. 397 (1997).

66. No-contest clauses are not restricted to use in wills. The no-contest clauses are being included in a range of trust instruments. *See, e.g., Doolittle v. Exchange Bank*, 241 Cal. App. 4th 529 (2015); *Rafalko v. Georgiadis*, 77 S.E.2d 870 (Va. 2015); *see also Duncan v. Rawls*, 812 S.E.2d 674, 651–52 (Ga. Ct. App. 2018) (interpreting no-contest clause statute referencing wills to also be applicable to trusts). As part of an integrated estate plan, the no-contest clause may be included in both the testator's will and the testator-settlor's lifetime trusts too. *E.g., In re Estate of Walsh*, 975 N.Y.S.2d 370 (Sur. Ct. 2013). For an analysis of no-contest clauses in trusts and a proposal for the proper approach to approach no-contest clauses in trusts, see Deborah S. Gordon, *Forfeiting Trust*, 57 WM. & MARY L. REV. 455 (2015).

67. *See, e.g.,* 10 NEW YORK FORMS LEGAL & BUS. § 24:116 *Drafting will* (2018) (listing the no-contest clause as item 17 in 34 item checklist).

good faith and with probable cause, then all benefits for such beneficiary in this Will are revoked and annulled and the benefits which such beneficiary would have received shall to the residuary beneficiaries of this Will, other than such contesting beneficiary. If all of the residuary beneficiaries join in such a contest or proceeding, the residue of my estate shall be disposed of as follows: _____.⁶⁸

This two-sentence structure has long been a pattern for no-contest clauses. The first sentence is 83 words and seeks to intimidate the beneficiary from objecting to anything related to the will. The second 24 word sentence frame directs the disposition of the forfeited gift.

The modern no-contest clauses can be traced to language like the following 19 word sentence: “No beneficiary hereunder who contests this will or challenges any provision hereunder shall take any interest under this will.”⁶⁹

Still one sentence, the clause expanded to the following:

If any beneficiary under this Will shall in any way, directly or indirectly, contest, object to, or hinder the probate of this Will, or dispute any of its provisions, or exercise or attempt to exercise, or give any notice with a view to exercising any right to take any part or share of my estate otherwise than in accordance with the provisions of this Will, or institute or prosecute, or be in any way, directly or indirectly, interested or instrumental in the institution or prosecution of, any action, proceeding, contest or objection, or give any notice, for the purpose of setting aside or invalidating this Will, or any of its provisions or question in any manner the exercise by my Executors of any discretionary power hereunder, or conspire with or give aid to any person doing or attempting any of the foregoing, then in each case all provisions for such beneficiary and his or her descendants herein shall be void, and my estate shall be disposed of as though such person had predeceased me leaving no descendants surviving me.⁷⁰

In addition to referencing additional circumstances, the language may incorporate more overtly aggressive language, as in the following:

68. RADFORD, *supra* note 4, at 298 (blank line in original). The first edition of this book includes sample forms, but does not include a sample no-contest clause. DANIEL REDFEARN WILLS AND ADMINISTRATION IN GEORGIA (1923).

69. LEONARD LEVIN, A STUDENT’S GUIDE TO WILL DRAFTING 60 (1987).

70. Provision from *In re Estate of Robbins*, 544 N.Y.S.2d 427, 428 (Sur. Ct. 1989).

4.1 NON-CONTEST CLAUSE. If any beneficiary under this Will, in any manner, directly or indirectly, contests or *attacks* this Will or any of its provisions in any legal proceeding *designed to thwart* my intentions as expressed in this Will, any share or interest in my estate given to that *contesting* beneficiary under this Will is hereby *revoked* and shall be disposed of in the same manner provided herein as if that *contesting* beneficiary had *predeceased me without surviving descendants*.⁷¹

The sameness of the language and sentence construction demonstrates how boilerplate provisions are products of arguments made in cases, interpretations made by courts, and commentary shared by scholars and practitioners. While drafters should use arguments, interpretations, and commentaries to evaluate testamentary language, the mere tacking on of language and replication of so-called “time-tested” language does not advance the purpose of the provision. The phrasing coupled with the exceptions mean that “*in terrorem* clauses are frequently reduced to empty threats.”⁷²

C. Appeal to Testators and Drafters

For a provision that has been called “a medieval hoax”⁷³ and “a grotesque fiction,”⁷⁴ the no-contest clause continues to have enduring appeal. No-contest clauses are considered, in the words of one court, to “protect estates from costly, time consuming and vexatious litigation; and serve to minimize family bickering concerning the competency and capacity of the testator, as well as the amounts bequeathed, they are favored by public policy.”⁷⁵ This language is mirrored by another court by describing the benefits of a no-contest clause as “dissuad[ing]” beneficiaries “‘from filing vexatious litigation, particularly as among family members, that might thwart the intent of the grantor’ by making the gifts under the instrument conditional on the beneficiaries not

71. LWT of Sammy Davis, Jr. dated March 12, 1990 in HERBERT NESS, WILLS OF RICH AND FAMOUS (Gramercy Books 1991).

72. Ronald Z. Domsy, *In Terrorem Clauses: More Bark Than Bite?*, 25 LOY. U. CHI. L.J. 493, 494 (1994).

73. Olin L. Browder, Jr., *Testamentary Conditions Against Contest Re-Examined*, 49 COLO. L. REV. 320, 339 (1949).

74. Olin L. Browder, Jr., *Testamentary Conditions Against Contest*, 36 MICH. L. REV. 1066, 1093 (1938).

75. *In re Estate of Simpson*, 595 A.2d 94, 100 (Pa. Super. Ct. 1991) (quoting *Matter of Estate of Westfahl*, 674 F.2d 21, 23 (Okla. 1983)).

challenging the validity of the instrument.”⁷⁶ Anecdotal evidence about the power of no-contest clauses has yet to be verified by empirical studies.

In part because of the lack of empirical support but also influenced by critically interrogating the language, scholars and commentators have encouraged reimagining of the language of no-contest clauses. For example, one sample no-contest clause proposed by a scholar in 1965 suggested that the clause begin with the following sentence: “I earnestly ask my beneficiaries, devisees and legatees, in harmony and in all things, to aid my executor in carrying out my wishes as expressed in this Will.”⁷⁷ The standardized form-based no-contest clause has resisted, for the most part, such revisions.

The standard clause continues to appeal to both testators⁷⁸ and drafters. As Professor Gerry Beyer summarized,

In terrorem provisions are one of the most frequently used contest prevention techniques. This widespread use is probably due to the technique’s low cost (a few extra lines in the will), low risk (no penalty incurred if a court declares the clause unenforceable), and potential for effectuating the testator’s intent (property passing via the will rather than through intestacy or under a prior will).⁷⁹

From the testator’s perspective,⁸⁰ the phrasing of the standard no-contest clause sounds strong. The language is confident. The long sentences and dense paragraph structure convey confidence as though the language was refined and expanded upon thoughtfully through the years. The litany of acts that may invoke the no-contest clause appears to be comprehensive. The language is forceful. The consequences for failing to comply sound dire. Yet, the language and structure may give the testator a false confidence. The inclusion of the no-contest clause provides no guarantees about the enforceability of the clause. The

76. *In re Estate of Boylan*, No. 02-14-00170-CV, 2015 WL 598531 at *2 (Tex. Ct. App. Feb. 12, 2015) (quoting *Di Portanova v. Monroe*, 402 S.W.3d 711, 715 (Tex. Ct. App. 2012)).

77. Jack, *supra* note 25, at 736.

78. *See, e.g.*, Kenner, *supra* note 44, at 270 (attributing the increased use of no-contest clauses to “demand among clients wishing wills prepared, that the attorney insert some binding condition which will avert a future contest”).

79. Gerry W. Beyer, *Will Contests—Prediction and Prevention*, 4 EST. PLAN. & COMMUNITY. PROP. L.J. 1, 7 (2011).

80. When Louisiana changed its forced heirship regime, one commentator predicted that “[t]his increased freedom may prompt testators to resort to penalty provisions as a guarantee that their wills are enforced.” Irina Fox, Comment, *Penalty Clauses in Testaments: What Louisiana Can Learn from the Common Law*, 70 LA. L. REV. 1265, 1267 (2010).

clause may not be enforceable in the scope envisioned by the testator—or even enforceable at all. The clause may not thus influence the behavior of the beneficiaries.

Just as with the testator, the drafter may become over-confident about the power of the clause because of the length and structure. The repetition of no-contest clause language feeds into the myth of the time-tested power of the language. The length suggests a continued evolution that adapts and ultimately strengthens the power of the clause.

The drafter may also be reluctant to dismiss the potential benefits afforded by the clause's inclusion. Even if those benefits are limited, the clause may after all strike terror in the hearts of some beneficiaries in some instances. Drafters are justifiably cautious with language in a will. A will that is created today may not be submitted to the probate court for fifty years or more. A will created today may be submitted to the probate court one day after its execution. The language used has to adapt to the changes in the testator's relationships—whether births, deaths, marriages, or divorces—and changes in the testator's property. For that reason, drafters do not want to alter the language on a hunch about the possible negative reaction to the “standard” provision.

The inclusion of the clause may appear to incur no or low costs. One more clause is included that may prevent the filing of a costly contest. Characterizing the inclusion of the standard no-contest clause as relatively low cost does not recognize the risks that such standard language brings. The voice begins to be inauthentic and false. In other words, not personal to the testator or not personal to the will's beneficiaries. Those concerns include distancing testators from their wills and prompting a will contest.

The mere presence of a no-contest clause may provoke will contest by suggesting to the beneficiaries that the testator anticipated that a will contest would indeed be filed. For that reason, no-contest clauses have never been a fixture of every will.⁸¹ Indeed, the advice from 1963 remains applicable today.

As for *in terrorem* clauses, I suggest they be used sparingly. Their validity has been upheld but at times they seem to invite a contest by arousing suspicions which might otherwise not exist—and often there is available some heir (or legatee under

81. Jack, *supra* note 25, at 737 (“The no-contest clause should not be inserted in wills promiscuously or as a matter of form.”).

a prior will) with little at stake who is persuaded to serve as a cat's-paw for the others.⁸²

D. Gendered Dimension to the Standard No-Contest Clause

The standard no-contest clauses may perpetuate gender stereotypes. Language is not neutral. The users of language will find identification with the language.⁸³ Historically, the language of the law was masculine.⁸⁴

At the time the no-contest clauses were originally developed, a testator was a white male owner of real property.⁸⁵ For the vast majority of the history of the legal profession, lawyers were white males. In statutes, cases, commentaries, and articles, use of the gendered term “draftsman” and use of the masculine singular “he” to refer to a testator were common.⁸⁶ In addressing the importance of language in the law, one scholar in 1959 wrote, “While legal *men* of various stripes have always been interested in language, particularly legal language, even they do not until this quarter century seem to have

82. Paul B. Sargent, *Drafting of Wills and Estate Planning*, 43 B.U. L. REV. 179, 198 (1963); see also Jack, *supra* note 25, at 739 (“In the final analysis the no-contest clause should be sparingly used and carefully phrased . . .”).

83. *E.g.*, Adam R. Chang & Stephanie M. Wildman, *Gender In/Sight: Examining Culture and Constructions of Gender*, 18 GEO. J. GENDER & L. 43 (2017); Hannah Arenstam, *A Mother of a Problem: How the Language of Inequality Affects Maternity Leave Policies and Women in Law Firms*, 12 NW. J.L. & SOC. POL'Y 1 (2017).

84. Karen J. Sneddon, *Not Your Mother's Will: Gender, Language, and Wills*, 98 MARQ. L. REV. 1535 (2015); Matthew A. Ritter, *The Penile Code: The Gendered Nature of the Language of Law*, 2 N.Y. CITY L. REV. 1 (1998). Vestiges of the masculinity remain. See, e.g., Kristina M. Lagasee, Comment, *Language, Gender, and Louisiana Law: Removing Gender Bias from the Louisiana Civil Code*, 64 LOY. L. REV. 187, 187 (2018) (“Almost all of the 2,178 articles of the Louisiana Civil Code—the state's principal source of law—use solely masculine pronouns.”). The Feminist Judgments Projects are changing thoughts about feminist theory and judging. Bridget J. Crawford, Kathryn M. Stanchi & Linda L. Berger, *Feminist Judging Matters: How Feminist Theory and Methods Affect the Process of Judgment*, 47 U. BALT. L. REV. 167 (2018). The Trusts and Estates Volume of Feminist Judgments is forthcoming.

85. The following sentences are a typical representation of a male-focused testator. “The making of a will is one of the most solemn and consequential acts of a *man's* life. Upon its legal and proper presentation depends the future happiness and welfare of the persons and objects most dear to *him*.” Kenner, *supra* note 44, at 269 (emphasis added).

86. See, e.g., Leavitt, *supra* note 41, at 46 (using the term “draftsman”).

shown the conscious awareness of words as words.”⁸⁷ Even today, the legal profession continues to be dominated by males.⁸⁸

Gendered language continues to be used, and gender stereotypes persist. The language⁸⁹ used reflects embedded bias.⁹⁰ For instance, in a recent article encouraging estate planners to focus on the counseling aspect of estate planning representation, the male lawyer-commentator wrote the following: “However, the estate planner who focuses on the transfer of property with minimum tax consequences is abdicating part of *his* counseling responsibility to *his* client.”⁹¹

The language of wills should reflect the diversity of today’s testators.⁹² As Kathleen Dillon Narko wrote in 2017, “How we [as lawyers] write reflects how society treats groups.”⁹³ Likewise, as Pat K. Chew & Lauren K. Kelley-Chew wrote, “As lawyers, we

87. Walter Probert, *Law and Persuasion: The Language Behavior of Lawyers*, 108 U. PA. L. REV. 35, 35 (1959) (emphasis added).

88. E.g., Lisa Kirby & Caren Ulrich Stacy, ‘Hacking’ *The Glass Ceiling in Law Firms: Women’s Hackathon Generates Business Innovations to Achieve Greater Diversity*, LAW PRAC. July/Aug. 2017, at 42, 43 (“Since 2000 the representation of women equity partners in large law firms has increased a mere 2 percent . . .”). For statistics about women in all aspects of the legal profession, see Am. Bar Assoc. Comm’n on Women in the Legal Profession, *A Current Glance at Women in the Legal Profession*, A.B.A., (Jan. 2018), <https://www.americanbar.org/content/dam/aba/administrative/women/a-current-glance-at-women-in-the-law-jan-2018.pdf> [<https://perma.cc/G2D4-37YW>]. Bias may be continuing to hamper efforts of the legal community to reflect the diversity of the general population. See, e.g., Christina Shu Jien Chong, *Battling Biases: How Can Diverse Students Overcome Test Bias on the Multistate Bar Examination*, 18 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 31 (2018).

89. Karen Busby, *The Maleness of Legal Language*, 18 MAN. L.J. 191, 192 (1989) (arguing that “grammatical features of the legal register such as pronouns, generics, lexicon, semantics and syntax trivialize, exclude and devalue women and characteristics associated with women”); see also MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW* (1990); Lucinda M. Finley, *Breaking Women’s Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886 (1989); Mary Ellen Griffith, *Sexism, Language, and the Law*, 91 W. VA. L. REV. 125 (1988).

90. For a discussion about gender stereotypes, the identity of the testator, and the doctrine of undue influence, see Veena K. Murthy, Note, *Undue Influence and Gender Stereotypes: Legal Doctrine of Indoctrination*, 4 CARDOZO WOMEN’S L.J. 105 (1997).

91. L. Paul Hood, Jr., *The Human Side of Estate Planning Part 1*, TR. & EST., July 2018, at 52, 52 (emphasis added).

92. Language does change to reflect changes in society. See, e.g., Heidi K. Brown, *Inclusive Legal Writing: We Can Honor Good Grammar and Societal Change—At the Same Time*, A.B.A. J. 22, Apr. 2018 at 22, 22 (exploring use of “they” as a gender neutral singular pronoun); see also Pat K. Chew & Lauren K. Kelley-Chew, *Subtly Sexist Language*, 16 COLUM. J. GENDER & L. 643, 643–44 (2007).

93. Kathleen Dillon Narko, *They and Ze: The Power of Pronouns*, CHI. B. ASS’N REC., Jan. 2017, at 48, 48; see also Greg Johnson, *Welcome to Our Gender-Neutral Future*, VT. B.J., Fall 2016, at 36, 36–37.

understand the power of words. What we say and how we say it can perpetuate gender stereotypes and status differences between women and men. In contrast, language also can be used as a constructive tool for reinforcing equality.”⁹⁴ Posturing and bravado in the no-contest clause represents false strength that alienates both male testators and female testators.⁹⁵ Such language also alienates male beneficiaries and female beneficiaries. This language also does not reflect the identity of today’s drafters, and the modern language of the law.⁹⁶

III. CASE SPOTLIGHT—*LIPPER V. WESLOW*

When considering voice, strength, and no-contest clauses, scholars and commentators will immediately think of one case: *Lipper v. Weslow*.⁹⁷ The case has been consistently included in a number of trusts and estates case books,⁹⁸ ensuring that law students, academics, lawyers, and judges have read the case and will continue to be familiar with the case.⁹⁹ The case of *Lipper* showcases the potential dangers false strength, voice and no-contest clauses.

94. Chew & Kelley-Chew, *supra* note 92, at 643–44.

95. For a contemporary examination of the demographics of testacy, see DiRusso, *supra* note 43 at 36.

96. See, e.g., Susie Salmon, *Reconstructing the Voice of Authority*, 51 AKRON L. REV. 143, 146 (2017) (positing “that many of the ways in which law schools teach students how to be effective advocates also reinforce a paradigm of the male as the archetypal “good lawyer,” and that paradigm, in turn, feeds the implicit bias that causes many of the inequalities and injustices in the legal profession”). *But see* Leslie M. Rose, *Teaching Gender as a Core Value in the Legal-Writing Classroom*, 36 OKLA. CITY U. L. REV. 531 (2011) (sharing how to present gender issues to legal writing students by avoiding gender stereotypes in assignments and using gender-inclusive language).

97. 369 S.W.2d 698 (Tex. Civ. App. 1963). The case is also notable for exploring undue influence and the process by which undue influence is demonstrated. See, e.g., GERRY W. BEYER, 10 TEX. PRAC., TEXAS LAW OF WILLS § 51:23 (4th ed. 2018); PENNELL & NEWMAN, *supra* note 29, at 55–56; see also Jacqueline Asadorian, Note, *Disinheritance of Minor Children: A Proposal to Amend the Uniform Probate Code*, 31 B.C. THIRD WORLD L.J. 101, 118 (2011) (describing *Lipper v. Weslow* as “a case where a court did not apply the doctrine despite the clear presence of traditional indicia of undue influence”).

98. See, e.g., ALFRED L. BROPHY, DEBORAH GORDON, NORMAN P. STEIN, & CARYL YZENBAARD, EXPERIENCING TRUSTS & ESTATES 359–65 (West Publishing Group 2017); ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 296–301 (Wolters Kluwer 10th ed. 2017); ROGER W. ANDERSEN & IRA MARK BLOOM, FUNDAMENTALS OF TRUSTS AND ESTATES 145 (4th ed. 2012).

99. The case has long been featured in the popular trusts and estates casebook originally authored by Jesse Dukeminier and Stanley Johanson. JESSE DUKEMINIER, JR., & STANLEY M. JOHANSON, FAMILY WEALTH TRANSACTIONS: WILLS, TRUSTS, FUTURE INTERESTS, AND ESTATE PLANNING 591–98 (Little, Brown & Co. 1972).

The testator was named Sophie Block.¹⁰⁰ Sophie had been married three times and had three children from two of the marriages.¹⁰¹ One of her children, named Julian, predeceased her.¹⁰² Sophie did not have a close relationship with Julian's widow and their children.¹⁰³ Sophie did, however, have close relationships with her other two children, especially her son Frank Lipper who lived next door and had a key to Sophie's house.¹⁰⁴ When Sophie, aged eighty-one decided to create a will, she asked a lawyer she knew to help her: her son Frank.¹⁰⁵

When drafting the will, Frank anticipated that a will contest might be filed.¹⁰⁶ This anticipation was grounded in several facts. Frank was one of the beneficiaries and named the personal representative.¹⁰⁷ Julian's three children were not provided for in the will.¹⁰⁸ Frank did not have a positive relationship with Julian during Julian's lifetime and did not appear to have a relationship with Julian's three children.¹⁰⁹ The applicable intestate scheme would have given Julian's share to his children by representation.¹¹⁰

Sophie, although living independently and physically active until the date of her death, was of an advanced age.¹¹¹ Frank undertook various planning techniques. The will included a no-contest clause and a statement of reasons for the disinheritance of Julian's three children.¹¹² The witnesses were not interested, but were two former business associates of Sophie's third husband.¹¹³ Despite these precautions, the will was not read by or to Sophie before she signed the will.¹¹⁴

100. *Lipper*, 369 S.W.2d at 699.

101. *Id.*

102. *Id.* at 699–700

103. *Id.* at 700–01

104. *Id.* at 701.

105. *Id.* at 702. Frank was actually named as the Independent Executor, a designation that is recognized in Texas. *Id.* at 699; TEX. PROB. CODE ANN. § 3(q)(1956). This designation authorizes less court supervision of the acts of the fiduciary. *See generally* M.K. WOODWARD & ERNEST E. SMITH, III, 17 TEX. PRACT. PROB. & DECEDENTS' ESTATES, § *Appointment of Independent Executor* (supplement by Gerry W. Beyer).

106. *See Lipper*, 369 S.W.2d at 700–01.

107. *Id.* at 699, 701–02; *see* TEX. PROB. CODE ANN § 3(q), (aa) (1956).

108. *Lipper*, 369 S.W.2d at 699.

109. *See id.* at 700–01.

110. *See id.* at 699–701, 703.

111. *Id.* at 701–02.

112. *Id.* at 700.

113. *See id.* at 699.

114. *Id.* at 701.

Twenty-two days after the execution of the will, Sophie died.¹¹⁵ Sophie was survived by her third husband Max Block, her daughter Irene, her son Frank, the widow of her son Julian, and Julian's three children.¹¹⁶ Julian's three children filed a will contest on the grounds of undue influence.¹¹⁷

The will included 10 sections, not including the introduction and the conclusion.¹¹⁸ The language of the no-contest clause is not a memorable aspect of the case because the clause itself is not quoted in the case.¹¹⁹ The no-contest clause had no deterrent effect because Julian's three children were not given any gift under the terms of the will.¹²⁰ Clause 9, which is a statement of reasons for the disinheritance, is what most recall about the case.¹²¹

Despite the recall that people have of this case, *Lipper* is not a good example of an effective use of voice or a no-contest clause. Instead, *Lipper* is an example of the dangers of an inauthentic voice and an ineffective no-contest clause. Clause 9 is a recitation of misdeeds and hurt caused by Sophie's daughter-in-law and the three children.¹²² The clause is almost 760 words with dense sentences that are strung together with commas.¹²³ The first sentence alone is 129 words.¹²⁴ In addition to reciting factually inaccurate information, the clause relies upon overtly aggressive language. For example, the clause proclaims that

I want to go into sufficient detail in explaining my relationship in past years with my said son's widow and his children . . . it is my desire to record such relationship so that there will be no question as to my feelings in the matter¹²⁵

Her son's widow is described as "unfriendly" and "distant."¹²⁶ The text is also whiny and judgmental, as demonstrated with the following language "my life would have been much happier if they [Julian's widow and his three children] had shown a disposition to want to be a

115. *Id.*

116. *Id.* at 699.

117. *Id.*

118. *Id.* at 699–701.

119. *Id.* at 700.

120. *Id.* at 699.

121. *See, e.g.*, ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 302–04 (10th ed. 2017).

122. *Lipper*, 369 S.W. 2d at 700–01.

123. *Id.*

124. *Id.* at 700.

125. *Id.*

126. *See id.*

part of the family and enter into a normal family relationship that usually exists with a daughter-in-law and grandchildren and great grandchildren.”¹²⁷ The clause is full of legalese. For instance, the words “such” and “said” are used extensively throughout the clause as pointing words.¹²⁸ The text is stilted and bears little resemblance to spoken speech.

Despite the worthless no-contest clause and the problematic statement of reasons, the will contest was ultimately not successful.¹²⁹ The last will of Sophie Block was admitted to probate.¹³⁰ The appellate court stated that the testator will was “unnatural” because the difference between the dispositive scheme and the intestate scheme.¹³¹ The appellate court also stated that Sophie “had a right to do as she did, whether we [the appellate court] think she was justified or not.”¹³² The language used in both Clause 8 and Clause 9 might have, instead of discouraging a will contest, actually encouraged the will contest. The false strength of Clause 9 represents the exact concern of the standard no-contest clause language.

VI. SURVEY OF CASES FROM 2012–17

The case of *Lipper v. Weslow* is not an idiosyncratic case in either its facts or its attempt to assume strength through aggressive, judgmental testamentary language. Likewise, the case of *Lipper v. Weslow* is not outdated in its use of the hollow no-contest clause language. To determine whether “time-tested” language continues to be used in modern no-contest clauses, a survey of recent cases was undertaken. A survey of state cases for a five year period from 2012 to 2017 revealed twenty-one cases from across the country examining the enforceability of no-contest clauses in wills.¹³³ A number of these cases

127. *Id.*

128. “*Such* and *said* are perhaps the most commonly misused words in legal writing.” Marie Antoinette Moore, *Such and Said, This and That*, 29 PROB. & PROP., Sept./Oct. 2015, at 64.

129. *Lipper*, 369 S.W.2d at 703.

130. *Id.*

131. *Id.*

132. *Id.* After the will’s execution and in response to a comment by a neighbor, Sophie stated that she “would have those wills fixed up so there would be no court business.” *Id.* at 701. Sophie also stated that she would not “leave them [Julian’s three children] a dime.” *Id.*

133. The survey does not include review of cases that exclusively evaluating no-contest clauses included in inter vivos trusts. *E.g.*, *In re ATS 1998 Trust*, 403 P.3d 684 (Nev. 2017) (unpublished table disposition). Likewise, the survey does not include cases where the will included a no-contest clause but the applicability or enforceability of the no-contest clause was not an issue. *E.g.*, *In re Last Will and Testament of Lubin*,

are designated unreported dispositions¹³⁴ or unpublished opinions.¹³⁵ These cases included wills that were executed from 1992 to 2013, which is a reminder that a will drafted years ago will be interpreted with modern eyes in the probate proceedings.

An odd situation arises when reviewing no-contest clauses that appear in reported cases. The existence of the case represents a failure of the no-contest clause. A will contest has been filed.¹³⁶ The most effective examples of no-contest clauses may then be excluded from a review of court opinions. Nevertheless, the review of cases can inform drafting decisions.

In the vast majority of these cases, the no-contest clauses did not result in the forfeiture of a testamentary gift.¹³⁷ These clauses did not operate as intended for several reasons. Those reasons included recognizing the applicability of the good-faith-probable-cause exception¹³⁸ and classifying the actions of the beneficiary as not triggering the clause.¹³⁹ Ineffective use of the clause continues when the no-contest clause is included, but the heirs who are contesting are not given a testamentary gift.¹⁴⁰

A typical clause from the reviewed cases reads as follows:

In the event that any person shall contest this Will or attempt to establish that he or she is entitled to any portion of my estate or to any right as an heir, other than as herein provided, I hereby give and bequeath unto any such person the sum of one dollar.¹⁴¹

975 N.Y.S.2d 366 (Sur. Ct. 2013) (unreported table disposition) (considering pre-answer motion to dismiss and noting that the will included a no-contest clause).

134. *E.g.*, *In re Estate of Carpenter*, 410 P.3d 951, 2017 WL 6617077 (2017) (unpublished table disposition) (enforcing the no-contest clause); *In re Estate of Sochurek*, 41 N.Y.S.3d 452 (Sur. Ct. 2016) (unreported disposition) (enforcing the no-contest clause and finding that the challengers “have forfeited their legacies”).

135. *E.g.*, *Sinnott v. Sinnott*, 88 Mass. App. Ct. 1119 (2016) (unpublished table opinion); *In re Estate of Alexander*, 2015 IL App. (4th) 141096-U (unpublished opinion).

136. *E.g.*, Pfaltz, Jr., *supra* note 41, at 780 (“In those cases where a contest arises in spite of the existence of an *in terrorem* provision, the clause has failed to fulfill its function, and it may matter little that the clause is inconsistently applied, at least for the estate involved.”).

137. *E.g.*, *Parker v. Benoist*, 160 So. 3d 198, 207–09 (Miss. 2015); *In re Estate of Boylan*, No. 02-14-00170-CV, 2015 WL 598531 at *2 (Tex. Ct. App. Feb. 12, 2015).

138. *E.g.*, *Parker v. Benoist*, 160 So. 3d 198, 207–09 (Miss. 2015).

139. *E.g.*, *In re Estate of Dayan*, 209 Cal. Rptr. 3d 712, 721 (Ct. App. 2016).

140. *E.g.*, *Cresto v. Cresto*, 358 P.3d 831, 845–46 (Kan. 2015).

141. *In re Estate of Primani*, 198 Wash. App. 1067, (2017) (unpublished opinion) (remanding for proceedings to determine whether the filed will contest was

The generic “any person”¹⁴² and “any beneficiary”¹⁴³ were used. The prohibited list of acts included not only filing a will contest but any attempt “or oppose or seek to set aside”¹⁴⁴ the will. Forceful language was used to describe the actions of the beneficiaries, including “attacks,”¹⁴⁵ “impair”¹⁴⁶ and “interfere.”¹⁴⁷ The bland term “establish”¹⁴⁸ was also used. These actions could occur in a court or “any tribunal.”¹⁴⁹ The consequence of the clause ranged from a direction to distribute the property to the residuary beneficiary¹⁵⁰ to distribute the property “as if that contesting beneficiary had not survived me.”¹⁵¹ The more aggressive direction dictated that the forfeited property was to be “distribute[d] as if the contesting beneficiary predeceased me without any living descendants.”¹⁵²

One case was notable because the case included a no-contest clause using voice as a technique to influence the beneficiaries.¹⁵³ The clause reads as follows:

It is my expressed desire and intent to have the provisions of this my Last Will and Testament administered without objection by any of my named beneficiaries. I have given this Will a great deal of thought and firmly believe the provisions set forth herein are fair and equitable to all beneficiaries. In the event any beneficiary shall legally challenge this Will, making any claim against the estate or attempt to partition the

made in good faith). Not all of the court opinions quote the no-contest clause. *E.g.*, *In re Estate of Sand*, No. A-4524-10T4, 2013 WL 375575 (N.J. Super. Ct. App. Div.).

142. *Estate of Primani*, 198 Wash. App. 1067.

143. *In re Estate of Fisher*, No. 2778 EDA 2012, 2013 WL 11255631, at *1 (Pa. Super. Ct. 2013) (non-precedential decision).

144. *In re Estate of Landon*, No. 5230-MZ, 2017 WL 2492044, at *1 (Del. Ch.) (unpublished opinion).

145. *In re Estate of Dayan*, 209 Cal. Rptr. 3d 712, 715 (Ct. App. 2016).

146. *In re Estate of Peters*, 17 N.Y.S.3d 805, 805 (Sup. Ct. 2015).

147. *In re Estate of Sochurek*, 52 Misc. 3d 1204(A) (N.Y. Sur. Ct. 2016) (unreported disposition).

148. *Estate of Primani*, 198 Wash. App. 1067.

149. *E.g.*, *In re Estate of Mahoney*, 347 P.3d 1214 (Kan. Ct. App. 2015) (unpublished disposition).

150. *See, e.g.*, *Parker v. Benoist*, 160 So. 3d 198 (Miss. 2015).

151. *In re Span Estate*, 2016 WL 520009, at *1 (Mich. Ct. App. 2016) (unpublished opinion).

152. *In re Estate of Fisher*, No. 2778 EDA 2012, 2013 WL 11255631, at *1 (Pa. Super. Ct. 2013) (non-precedential decision).

153. *Gleason v. Korde*, 856 N.W.2d 381 (Iowa Ct. App. 2014) (decision without published opinion).

real estate, then that beneficiary's share shall be forfeited and distributed to the other named beneficiaries.¹⁵⁴

The Iowa Court of Appeals ultimately did not address the enforceability of the clause because the filed dispute was about the petition to partition the real property subsequent to the closing of the estate.¹⁵⁵ The language quoted above appeals to the beneficiaries to respect the terms. Rather than provoking an aggressive response to object to the terms, this language attempts to inspire acceptance and respect for the terms.

These court opinions evidence that no-contest clauses are still being included in wills written in this century. These clauses continue to have appeal. The reviewed clauses have limited customization—with one notable exception.

V. IMPLICATIONS FOR TESTAMENTARY LANGUAGE

Evaluating and understanding the power and dangers of the no-contest clauses has broader implications for testamentary language. Wills are full of self-referencing. The will begins and ends with the singular first person “I” and the personal pronoun “me.” The will also includes numerous use of the possessive pronouns “mine” and “my.” Others will refer to the will by using the possessive pronouns “her” and “his.” Nonetheless, the language of the will reflects little of the testator's voice. The voice of the will needs to avoid ambiguity and does need to maintain a certain amount of formality as a formal legal document. Yet, in aiming for strength, the voice of the will can become bland, generic, and false. This is demonstrated by the false strength of the generic no-contest clause.

Despite concerns expressed about the dangers of no-contest clauses to provoke a will contest or have limited effectiveness in preventing the filing of a successful will contest, no-contests clauses continue to be used in wills.¹⁵⁶ Indeed, the use of no-contests clauses has expanded into new documents, specifically trust instruments.¹⁵⁷ The use may be attributed to a number of reasons, but these reasons raise implications about perpetuating stereotypes and discouraging drafting innovation. Both concerns are not limited to the analysis of no-contest clauses.

Wills drafted today may not be submitted to a probate court for fifty years or more. Declaring any provision, including a no-contest

154. *Id.*

155. *Id.*

156. *See, e.g.*, Dawn Koren, *No-Contest Clauses: Settlement Offers from the Grave*, 12 PROB. L.J. 173, 173 (1995).

157. *See, e.g.*, Gordon, *supra* note 66, at 484–505.

clause, to have no value in any situation would be an overstatement. In the case of no-contest clauses, it is impossible to determine with any degree of certainty how many no-contest clauses are used that prevent a contest from being filed.¹⁵⁸ If no contest has been filed, no paper trail exists. The cases involving the enforceability of the no-contest clauses evidence that the clause did not in fact prevent the filing of a will contest. But some of those clauses are indeed enforceable and do indeed effectuate the expressed intent of the testator to have a contesting beneficiary forfeit his or her share.¹⁵⁹

Testamentary language has proven to be “sticky.” Provisions continue to be used as a result of audience expectation and concern that eliminating provisions creates unintended consequences.¹⁶⁰ “If it ain’t broke” can be a convenient excuse that inhibits drafting innovation.¹⁶¹ This reluctance might also be a perception that courts are comfortable with interpreting the standard language. But a 2017 California court refutes this sentiment with the following statement: “Generic no-contests clauses, which is what we have here, are obsolete.”¹⁶²

Including standard provisions may actually create risks. In the use of no-contest clauses, the one sentence may inspire a false confidence of standard that prevents the consideration of other more effective planning techniques. The language assumes a posturing tone that further distances testators from their most personal of legal documents.¹⁶³ This distance can also encourage the testator’s family, beneficiaries, personal

158. *Id.* (“To a large extent, any data on the frequency with which no-contest clauses are used is purely conjectural, as most uses have not come within the purview of their judicial system.”).

159. *Wilson v. Dallas*, 743 S.E.2d 746, 762 (S.C. 2013) (stating that James Brown’s inclusion of the no-contest clause in both his will and his trust is “[a]nother strong indicator of Brown’s intent” as to the dispositive scheme).

160. *See, e.g.*, Kenneth A. Adams, *Dysfunction in Contract Drafting: The Causes and a Cure*, 15 *TRANSACTIONS: TENN. J. BUS. L.* 317, 323, 327 (2014) (noting that over-confidence may be produced when the drafter relies upon previously drafted documents or form documents); Larry E. Ribstein, *Sticky Forms, Property Rights, and Law*, 40 *HOFSTRA L. REV.* 65, 68 (2011) (“One reason for not changing a contract clause that has stopped making sense is that the costs of change outweigh the benefits.”); *see also* Robert E. Shapiro, *Do Lawyers Think about What They’re Doing?*, 41 *LITIG.* 59, 60 (2015) (“These provisions have now become routine, done because always done.”).

161. *E.g.*, Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Contract and Innovation: The Limited Role of Generalist Courts in the Evolution of Novel Contractual Forms*, 88 *N.Y.U. L. REV.* 170, 190–91 (2013) (exploring the role that courts can play in promoting and hindering contract innovation).

162. *Aviles v. Swearingen*, 224 Cal. Rptr. 3d 686, n.4 (Ct. App. 2017) (urging “particularity” in the drafting of no-contest clauses). This statement could be extended to generic testamentary language.

163. This is especially true for those who might be considered outsiders to the law or groups who have been historically marginalized in the law. *See* discussion *supra* Part II.C.

representative, and even the court to project an alternate interpretation of the words.¹⁶⁴

Scholars and commentators have urged the customization of testamentary language, including the language of no-contest clauses.¹⁶⁵ One scholar in 1963 stated that “[t]he particular language used to achieve compliance with the testator’s wishes naturally varies from will to will, according to the style of the individual drafts[person].”¹⁶⁶ This variation may be a reflection of the goals and needs of testators. More recently, a commentator states that “testators can be extremely creative in their phraseology”¹⁶⁷ But that has not been the case with no-contest clauses, certainly not the no-contest clauses that appear in modern cases. The clauses used most commonly today appear to be generic replications of stock language.¹⁶⁸

Varying so-called standard drafting practices raises the concern of increasing the transaction costs. Customizing documents need not to be expensive. Providing detailed client intake questionnaires can minimize the time that is needed to gather sufficient facts to customize the provision. Document automation can still occur with new provisions that can be added to the provision bank.

The generic no-contest clause also perpetuates gender stereotypes by equating strong language with forcefulness. The off-the-cuff dismissal of expressive language is an example of language that is discouraged because the language deviates from the “standard” will language. Expressive language is only one example of “non-standard” language. Other examples include altering the order of provisions and providing expanded descriptions of tangible personal property. Personalization can further the goals of the particular legal instrument.

This Article does not advocate that no-contest clauses should never be used in wills. Instead, this Article asserts that thoughtful drafting is critical. The standard no-contest clause should not be seen as a low risk technique to prevent the filing of a will contest. Where including the no-contest clause in particular wills, the language of the standard no-contest clauses should be altered to reflect the voice of the testator. To begin, the clause should not include overtly aggressive phrasing. Care

164. See *supra* note 62 and accompanying text.

165. Jack Challis, *In Terrorem Clauses: Avoiding Will Contests and Disinheritance (with Sample Provisions)*, 17 ALI-ABA EST. PLAN. CONCISE MATERIALS J. 35, 42 (June 2011) (emphasizing the need to customize use and language of the clause for each particular testator).

166. Leavitt, *supra* note 41, at 46.

167. Fox, *supra* note 80, at 1266.

168. See *supra* note 160 and accompanying text. Customized no-contest clauses may be so successful that no will contest is filed. Thus, no court cases quoting such customized language can be found.

should be taken to avoid “the use of extreme or bitter words.”¹⁶⁹ The bitterness can be evidenced by use of “attack” rather than “object.” The aggressive language is an example of false strength and false voice. The language and tone could be moderated.¹⁷⁰ The clause should instead be prefaced with the following language: “While I anticipate only an amicable administration of my estate, I”¹⁷¹ Another option for framing the clause is as follows: “I earnestly ask my beneficiaries, devisees and legatees in harmony and in all things, to aid my executor in carrying out my wishes as expressed in this Will. In order to insure this, it is my Will, and I”¹⁷²

The will is both a legal document and a personal document. Yet, all too often the testator, the testator’s family, the testator’s beneficiaries, and the testator’s personal representatives do not see the connection between the person and the language.

CONCLUSION

When a testator makes a will, the testator wants his or her wishes to be respected. How to ensure that the testator’s wishes are respected after the testator dies presents a conundrum for both testators and drafters. Voice presents the opportunity for the testator to speak directly to the testator’s beneficiaries, family members, personal representative, and, ultimately the court. The issue of how to achieve a strong voice is highlighted by examining the no-contest clause where the distinction between compelling language and bullying language can become blurred. Testators and drafters have long abandoned the threatening language of *in terrorem* clauses that proclaims, “[h]e who wishes to alter this will, unless it be I myself, may God destroy him now and on the Day of Judgment.”¹⁷³ The replacement language has not been as successful as it might otherwise be. The language of a standard no-contest clause aims to be comprehensive and definitive by referencing “any person” and itemizing a litany of prohibited acts. The words “thwart” and “attack” are replicated from clause to clause. The provision becomes dense, and the voice becomes generic. Rather than showcasing strength, the voice resonates as hollow. Replicating aggressive language that thunders threats may not only inspire the filing

169. Jaworski, *supra* note 18, at 90.

170. *E.g.*, SUSAN BRODY ET AL., LEGAL DRAFTING 138 (Aspen 1994) (suggesting to the testator that “[y]ou may deflect some hostility by softening the tone of your documents”).

171. RALPH R. NEUHOFF, STANDARDS CLAUSES ARE WILLS 72.7 (3d ed. 1962).

172. Jack, *supra* note 25, at 736.

173. WHITELOCK, *supra* note 34, at 83 (Will of Thurstan).

of a will contest but also hinder drafting innovation and customization of the will's language to reflect the particular testator.

This examination of no-contest clauses has been undertaken not exclusively to advocate for the limited use of generic no-contest clauses. Rather, this examination has been undertaken to explore the power of "time-tested" language and the lasting appeal of such formulaic testamentary language. This Article does not suggest that all form-based testamentary language should be eradicated from the will. Instead, this Article urges a willingness to consider new approaches to testamentary language that focus on the individual voice of the testator.