2011 WL 5920653 (Okla.) (Appellate Brief)
Supreme Court of Oklahoma.

Elizabeth ROESLER and Emily Beard Boucher, Plaintiffs/Appellees
in Case No. 109,200 Plaintiffs/Appellants in Case No. 109,201,
v.
Elly BEARD, Trustee of the John M. Beard Trust, Defendant/
Appellant in Case No. 109,200 Defendant/Appellee in Case No. 109,201.

Nos. 109,200, 109,201.
September 16, 2011.

Appeal from the District Court of Oklahoma County Case No. CJ-2008-2810
Trial Judge: The Honorable Noma Gurich
Oklahoma County District Court Case No. CJ-2008-2810
Nature of Action: Enforcement of Forfeiture Clause (Will/trust)

Defendant/Appellant's Brief in Chief

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***1** Defendant/Appellant, Elly Beard, Trustee of the John M. Beard Trust ("E. Beard"), for her Brief in Chief, sets forth the arguments, authorities and other matters set forth herein. [1]

DEFENDANT/APPELLANT'S SUMMARY OF THE RECORD

1. Elizabeth Roesler and Emily Beard Boucher (collectively, "Plaintiffs/Appellees"), are two of the three adult children of John M. Beard ("J. Beard"). Tr. Vol.1 at 41-42; Journal Entry of Judgment, filed January 19, 2011 ("Judgment") at 2.

2. E. Beard is the surviving spouse of J. Beard. J. Beard and E. Beard were married for over twenty-four years from May 28, 1982, until J. Beard's death on October 13, 2006. J. Beard died at the age of 80. Tr.Vol.7 at 993-994; Judgment at 1-2.

3. On April 23, 1998, J. Beard executed the John M. Beard Trust Second Amended and Restated Revocable Trust Agreement (the "98 Trust"). [2] Defendant's Exhibit 6; Judgment at 10.

***2** 4. Section 10.08 of the 98 Trust provides for forfeiture of a beneficiary's interest as follows: [3]

If any person interested in the Trust or the Trust Estate shall contest any provision affecting same, in whole or in part, and attempt to prevent the enforceability thereof according to its terms, then such contest and such attempt shall cancel and terminate all provisions for or in favor of the person making or inciting such contest, and in favor of such person's heirs, without regard to whether such contest shall succeed or not, and all and any provisions herein in favor of the person so making such contest, or attempting to, or inciting the same, and such person's heirs, is revoked and of no force and effect as to such person and such person's heirs, such provisions to remain in full force and effect as to all other persons, and the share of the contesting person shall be distributed among the other beneficiaries pro rata on a per stirpes basis.

Defendant's Exhibit 6; Judgment at 12.

5. On November 6, 1992, J. Beard executed his Last Will and Testament of John M. Beard (the "92 Will"). [4] Defendants Exhibit 3; Judgment at 9.

6. Section 8.01 of the 92 Will (J. Bear's last will) provides for forfeiture of a legatee's, devisee's or beneficiary's interest as follows: [5]

If any legatee, devisee, or beneficiary herein shall endeavor in any manner or form to contest, in any court or before any tribunal, this will, or the John M. Beard Trust or the validity of either, or the due and proper execution of either, or any provision contained in this will or the John M. Beard Trust, or shall in any way attempt to invalidate either, or any part, then and in such event such contestant shall from that time forth cease to have any right, title, or interest in or to any portion of my estate or any property devised or bequeathed hereunder to any income therefrom, and any and all provisions of this will in favor of or for the benefit of such contestant are in such event hereby absolutely revoked and any such contest shall be deemed a waiver by ***3** contestant of any and all claims that such contestant might otherwise have in or to my estate, or any part thereof, under the terms of this will or otherwise, and any and all rights and interest that the contestant would otherwise have had hereunder, I will and direct shall be and become a part of my estate to be disposed of by my executor and trustees herein named in the same manner, and such interest shall pass and vest under this will in the same manner, as if such contestant had died without heirs prior to the date set for the distribution of my estate.

Defendant's Exhibit 3; Judgment at 12.

7. J. Beard was aware of the forfeiture clauses in each of the Wills and Trusts (the "Forfeiture Clauses") and intended them to be enforced. Tr.Vol.5 at 722.

8. Plaintiffs/Appellees were aware of each of the Forfeiture Clauses prior to filing their Petition. Judgment at 12.

9. On March 27, 2008, Plaintiffs/Appellees filed their Petition seeking to invalidate the Wills and Trusts based on claims of undue influence, lack of testamentary capacity, breach of fiduciary duties, interference with the expectation of inheritance, fraud, punitive damages for reckless disregard of Plaintiffs/Appellees' rights, and fraudulent conveyance. Petition, filed March 27, 2008 (the "Petition").

10. On May 12, 2008, E. Beard filed a counter claim against Plaintiffs/Appellees alleging that their filing of the suit contesting the testamentary instruments of J. Beard violated the Forfeiture Clauses contained therein. Answer and Counterclaim of Elly Beard, Trustee of the John M. Beard Trust, filed May 12, 2008.

11. A non-jury trial was held on Plaintiffs/Appellees' claims and E. Beard's counter claim on August 17, 18, 19, 20, 23, 24, 25 and 26 of 2010. Judgment at 1.

12. At trial, the only persons testifying for the Plaintiffs were the Plaintiffs themselves, a child of one of the Plaintiffs, Plaintiffs' expert witness and a physician of J. ***4** Beard who testified, among other things, that J. Beard was of sound mind and not easily influenced by others. See Defendant's Exhibit 211j at 18-19, 28, 34.

13. At trial, Plaintiffs could provide no direct evidence for many of the claims they had brought against E. Beard. *See* Tr.Vol.2 at 261-271.

14. There was no evidence presented at trial that E. Beard breached her fiduciary duty. In fact, the trial court clearly, and publically, questioned Plaintiffs/Appellees' theory upon which they claimed E. Beard breached a fiduciary duty. See Tr.Vol.5 at 641-645.

15. There was no evidence presented at trial that E. Beard exerted her will upon J. Beard or substituted her will for his. Judgment at 5, 6, 9, 11.

16. At trial, no person, with the possible exception of Plaintiffs/Appellees, testified that J. Beard had a weak mind or diminished will, and even Plaintiffs/Appellees' own expert refused to state that J. Beard lacked mental capacity. *See* Court's Exhibit 1; Judgment at 26.

17. Following the Plaintiffs/Appellees' case-in-chief, the trial court granted a motion demurring to the evidence on Plaintiffs/Appellees' claims against E. Beard based on J. Beard's lack of testamentary capacity, E. Beard's alleged fraud, E. Beard's alleged breach of fiduciary duty for all times prior to J. Beard's death and E. Beard's alleged fraudulent conveyancing for all times prior to J. Beard's death. Tr.Vol.5 at 653-654; Judgment at 22, 26.

18. On January 19, 2011, the trial court filed the Journal Entry of Judgment, entering judgment in favor of Defendant E. Beard and against Plaintiffs/Appellees on each and every claim asserted by Plaintiffs/Appellees and upholding the testamentary instruments and disposition plan of J. Beard. The Judgment, however, failed to enforce the Forfeiture ***5** Clauses, which was contained in each of J. Beard's testamentary instruments, against the Plaintiffs, and the trial court ruled in favor of the Plaintiffs and against E. Beard on such issue. The trial court cited no factual finding in support of her holding that "probable cause existed," and there are no findings of fact which indicate why the trial court made such a holding. Judgment at 27-28.

19. J. Beard was fully capable of executing testamentary documents; had unsupervised visits with friends, family and business colleagues on numerous occasions; and continued to run his successful oil business until his death. Defendant's Exhibit 211a at 27, 43; Defendant's Exhibit 211i at 151; Tr.Vol.5 at 678, 703-704, 716-717, 743; Tr.Vol.6 at 777-778, 813; Tr.Vol.7 at 1036-1037; Judgment at 2, 4, 26.

20. J. Beard's physicians and friends had no alarm for his physical and mental health as they related to any of the claims made by Plaintiffs/Appellees. Defendant's Exhibit 211i at 152-153, 204-207; Defendant's Exhibit 211j at 22-23, 34; Tr.Vol.6 at 833, 847; Tr.Vol.7 at 917-918, 932-933; Judgment at 4, 6.

21. A number of witnesses close to J. Beard over the 24 years that J. Beard maintained his consistent estate plan testified of J. Beard's strong will and mental capacity. Defendant's Exhibit 211i at 151; Defendant's Exhibit 211j at 18-19, 34; Tr.Vol.5 at 748, 757; Tr.Vol.7 at 939, Judgment at 4.

22. Testimony at trial from each of J. Beard's personal attorneys and his accountant who advised J. Beard regarding his estate plan confirmed that J. Beard was not acting under the influence of any other person when discussing or executing his testamentary documents. Defendant's Exhibit 211a at 10, 12-13, 15-16, 18-19; Trial Transcript Vol.5 at 671, 675, 678; Tr.Vol.6 at 809-810; Tr.Vol.7 at 1027-1034; Judgment at 9-11.

***6** 23. E. Beard loved, cared for and took care of J. Beard for their 24 years of marriage. To the contrary, the Plaintiffs, J. Beard's children, seldom saw him. Defendant's Exhibits 69, 76; Tr.Vol.1 at 156; Tr.Vol.5 at 718; Tr.Vol.6 at 807-808, 850-851; Judgment at 2, 3, 4.

24. The Children's Trust in J. Beard's last trust provided for $610,000.00 to be distributed to each of the Plaintiffs upon his death. Judgment at 62.

25. From 1982 through the date of J. Beard's death, J. Beard and E. Beard made, at a minimum, $5,337,851.56 in gifts to his three daughters (and their spouses). Judgment at 43.

26. J. Beard had specific intentions as to what he intended to leave his daughters on his death and the total value of what he wanted to give his daughters during his lifetime and at his death. Judgment at 45.

ARGUMENTS AND AUTHORITIES

I. STANDARD OF REVIEW

The subject of wills and trusts and the control of trust estates presents a matter of equitable cognizance. *In re The Lorice T. Wallace Revocable Trust*, 2009 OK 34, 219 P.3d 536 (2009); *White v. Palmer*, 1971 OK 149, 498 P.2d 1401, 1406 (Okla. 1971). "Whenever possible, an appellate court must in an equity suit render or cause to be rendered that judgment which, in its opinion, the trial court should have rendered." *Snow v. Winn*, 607 P.2d 678, 681 (Okla. 1980).

In an appeal of a will or trust contest, an appellate court examines the whole record and weighs the evidence, and the trial court's findings may be overturned if they are clearly against the weight of the evidence or some governing principle of law; otherwise, they will ***7** not be disturbed. *Wallace*, 219 P.3d at 536; *White*, 498 P.2d at 1407. An appellate court is free to overrule the trial court when the evidence does not support the trial court's decision. *In re Estate of Webb*, 1993 OK 75, 863 P.2d 1116, 1123 (Okla. 1993).

II. THE FAILURE TO ENFORCE A FORFEITURE CLAUSE BASED SOLELY ON PROBABLE CAUSE IS IMPROPER

Defendant/Appellant raises four issues on appeal, one of which is whether the trial court applied an improper legal standard in refusing to enforce the Forfeiture Clauses in J. Beard's testamentary instruments by ruling that probable cause to contest a will or trust (i.e. the testamentary instruments) was a legally sufficient basis upon which to deny enforcement of the Forfeiture Clauses. The trial court held that "probable cause existed and accordingly, judgment is entered in favor of the Plaintiffs and against [E. Beard] on [E. Beard's] claim to enforce the forfeiture clauses contained in the testamentary instruments and estoppel

by election." Judgment at 27. Appellant contends that the trial court's failure to enforce the Forfeiture Clauses based solely on "probable cause" is improper because it is against Oklahoma public policy and is not, and should not be, the standard in Oklahoma.

A. The Failure to Enforce a Forfeiture Clause Based Solely on Probable Cause is Against Public Policy

Forfeiture clauses in testamentary instruments are valid and enforceable in Oklahoma. *Wallace*, 219 P.3d at 539; Barr v. Dawson, 2007 OK CIV APP 38, 158 P.3d 1073, 1075 (2006) (applies equally to trusts); In re Estate of Massey, 1998 OK CIV APP 116, 964 P.2d 238, 240 (1998); *In the Matter of the Estate of Zarrow*, 1984 OK 27, 688 P.2d 47, 48 (1984); *In the Matter of the Estate of Westfahl*, 1983 OK 119, 674 P.2d 21, 24 (1983); *Bridgeford v. Estate of Chamberlin*, 1977 OK 206, 573 P.2d 694, 696 (1978); ***8** *In re Rettenmeyer's Estate*, 1959 OK 199, 345 P.2d 872 (1959) (overruled on other grounds); *Whitmore v. Smith*, 94 Okl. 90, 221 P. 775, 777 (1923).

Forfeiture clauses in testamentary instruments are favored by the public policy of the State of Oklahoma. *Wallace*, 219 P.3d at 539; *Massey*, 964 P.2d 240; *Westfahl*, 675 P.2d 23. Such clauses are favored as a matter of public policy because they protect estates from costly, time-consuming and vexatious litigation, and minimize family bickering concerning the competence and capacity of the testator and the amounts bequeathed. *Wallace*, 219 P.3d at 539. All of the above were present in this case. As the United States Supreme Court has observed:

> Experience has shown that often after the death of a testator unexpected difficulties arise, technical rules of law are found to have been trespassed upon, contests are commenced wherein not infrequently are brought to light matters of private life that ought never to be made public, and in respect to which the voice of the testator cannot be heard either in explanation or denial, and as a result the manifest intention of the testator is thwarted. It is not strange in view of this, that testators have desired to secure compliance with their dispositions of property and have sought to incorporate provisions which should operate most powerfully to accomplish that result. And when a testator declares in his will that his several bequests are made upon the condition that the legatees acquiesce in the provisions of his will, the courts wisely hold that no legatee shall without compliance with that condition receive his bounty, or be put in a position to use it in the effort to thwart his expressed purposes.

Smithsonian Institution v. Meech, 169 U.S. 398, 18 S. Ct. 396, 42 L. Ed. 793, 800 (1897). [6]

Although admittedly courts are split on the issue of whether a forfeiture clause can be ignored when a claimant has mere probable cause to contest a will or trust, those courts refusing to disregard the testator's wishes have wisely identified far more policy reasons than ***9** those courts choosing to disregard the forfeiture clause because the claimant had "probable cause." In fact, as the Supreme Court of California has noted, "[w]e are aware that some text-writers have expressed views tending to support [no forfeiture for the reason that the claimant had probable ground for contest], ... but we cannot perceive any proper basis upon which to rest such a conclusion." *In re Estate of Miller*, 156 Cal. 119, 103 P. 842, 843 (1909).

First, courts have properly reasoned that denying a forfeiture clause because the claimant had good faith or probable cause to bring an action *actually destroys the forfeiture clause rule itself See Bender v. Bateman*, 22 Ohio App. 66, 168 N.E. 574, 575 (Ohio Ct. App., Muskingum County 1929). For example, in Oklahoma, "probable cause" to initiate a civil proceeding occurs if the movant "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." *Gray v. Abboud*, 184 Okla. 331, 87 P.2d 144, 147 (1939). In malicious prosecution cases, the general rule in Oklahoma is that a movant, who, in good faith, acts "on the properly secured advice of counsel[,] is relieved from liability for a civil action instituted by him." *Lewis v. Crystal Gas Co.*, 1975 OK 26, 532 P.2d 431, 433 (1975). In fact, "[i]t is well settled in this jurisdiction that where the uncontroverted evidence shows that a party has communicated all the facts bearing on the case within his knowledge before a competent attorney, and

has acted honestly and in good faith upon the advice given, then the absence of malice is established, *the want of probable cause negatived,* and he is exonerated from all liability." *Id.* (emphasis added).

Accordingly, if "probable cause" solely is the standard for failing to enforce forfeiture clauses, any contestant, after conferring with counsel, will have had probable cause to contest ***10** the testamentary instrument, thus protecting the contestant from the consequences of any forfeiture clause. *See Dutterer v. Logan,* 103 W. Va. 216, 137 S.E. 1, 2 (1927) ("If [advice of counsel] be a defense against a suit for criminal prosecution, it seems to us it ought to be equally so against the forfeiture of vested rights in property...."). Such a rule would all but eliminate and eviscerate the forfeiture clause rule, which should and would violate public policy in Oklahoma, ie. that enforcement of forfeiture clauses is favored. This is especially so when considering the backdrop of 12 Okla. Stat. § 2011(B) which, among other things, requires a lawyer to make reasonable inquiry of his client and certify (by the filing of such pleading) that the allegations or other factual conclusions have evidentiary support or are likely to have evidentiary support after discovery. Can you ever not have "probable cause" in Oklahoma when a lawyer files a petition after discussing the case facts with his or her client prior to the filing? Must the case be "utterly without merit" or "frivolous" before "probable cause" is negated? Against this patchwork of judicial decisions and Oklahoma statutes (none of which have direct application to will or trust contests), have we created, or would we create, a presumption of "probable cause" which unfairly requires the will or trust proponent to negate and overcome - and all expressly contrary to the plain dictates of the testator/trustor? How can the courts, in good conscience, uphold all parts of a will or trust against attack by disgruntled beneficiary daughters, but utterly fail to give validity to that single provision repeatedly engrafted by J. Beard to prevent those same daughters from challenging his express testamentary plan in costly, time-consuming and embarrassing court proceedings? How can this be justified? Is this what we want for ourselves and our society?

When probable cause and good faith are the *sole reasons* for denying the application of a forfeiture clause, the practical effect is, quite simply, the substitution of the court's view ***11** for the testator's will. *See Miller,* 103 P. at 843. J. Beard did not condition the application of the forfeiture clause of the Wills and Trusts upon whether there was probable cause to contest the Wills and Trusts. His testamentary documents were clear. As such, if Plaintiffs/Appellees are allowed to contest J. Beard's testamentary instruments and escape the consequences of the Forfeiture Clauses simply because a court has found "probable cause" to raise a claim as to the enforceability of the Wills and Trusts, J. Beard's intent will not have been accomplished, but instead thwarted. *See Alper v. Alper,* 2 N.J. 105, 65 A.2d 737, 741 (1949) ("The testator did not condition forfeiture upon *mala fides* or want of probable cause for the contest; and there is no overriding public policy which so conditions the forfeiture in defiance of the testamentary intention");[7] *Dainton v. Watson,* 658 P.2d 79, 81 (Wyo. 1983), (because the will did not include a probable cause or good faith exception to the forfeiture clause, rejecting the forfeiture clause "would require judicial construction where such construction would be clearly improper"). Similarly, the Oregon Supreme Court has concluded that there is no reason why the forfeiture clause paragraph of a will should be given less effect than any other provision of the will. *Larson v. Naslund,* 73 Ore. App. 699, 700 P.2d 276, 281 (Or. Ct. App. 1985). *See also Estate of Markham,* 46 Cal. App. 2d 307, 115 P.2d 866, 869 (Cal. App. 1941) ("Further, it must be conceded that the property of the testator is his to dispose of as he wills, and he is not called upon to consult the wishes or views of his beneficiaries or of juries or courts. After all, in the minds of others than the testator, the question whether a will is just or unjust is a matter of opinion, and the policy of the law is to make the disposition under a will in accordance with the desires of the testator.") ***12** (internal citations omitted); ***Elder*** *v.* ***Elder***, 84 R.I. 13, 120 A.2d 815, 819 (R.I. 1956) ("In view of the explicit expression of the testator's intent there is no room for construction by the court. Where the language of a will is unequivocally clear and the condition is lawful, we cannot find constitutional or statutory authority for a court to enforce or not to enforce a forfeiture clause in its discretion, or to rewrite the will according to its own disposition as to the motives prompting a contest.").

Many courts have also reasoned that because forfeiture clause issues are purely private issues, there is no public policy reason to deny their enforceability. There is no state interest in who ultimately receives the testator's property. *Rudd v. Searles,* 262 Mass. 490, 160 N.E. 882, 884 (1928); ***Elder***, 120 A.2d at 819. Further, a beneficiary has no duty to challenge his ancestor's will. *Id.* As such, the enforcement of a forfeiture clause is a matter of concern to the testator and his beneficiaries exclusively and no public interest is involved. *Alper,* 65 A.2d at 741. As the *Alper* court noted, "[t]here is no reason of public policy for

annexing to [a forfeiture clause condition] the rule of *probabilis causa litigandi*, for that would violate the explicit intention of the testator without serving the public interest." *Id.*

Courts have also held that the state's statutes are the properly declared public policy, which is binding on the judiciary. See ***Elder***, 120 A.2d at 819; *Dainton*, 658 P.2d at 82. "Ordinarily a court has no right to legislate judicially and to make public policy according to its own view where the general assembly has legislated on the subject matter." ***Elder***, 120 A.2d at 819. As was the case in both ***Elder*** and *Dainton*, the Oklahoma statutes enacted by the Oklahoma legislature do not include any statute nullifying a forfeiture clause when a claimant brings a contest in good faith or with probable cause. "If a change in that respect is desirable, it is for the legislature and not for the court." *Id.*

***13** Further, courts note the additional benefits of enforcing forfeiture clauses, regardless of probable cause.

> Contests over the allowance of wills frequently, if not invariably, result in minute examination into the habits, manners, beliefs, conduct, idiosyncrasies, and all the essentially private and personal affairs of the testator, when he is not alive and cannot explain what may without explanation be given a sinister appearance. To most persons such exposure to publicity of their own personality is distasteful, if not abhorrent.

Rudd, 160 N.E. at 886. *See also Barry*, 135 F.2d at 473 (recognizing the importance of enforcing the testator's desires "that those who share in his bounty shall not have been guilty of besmirching his reputation or parading the family skeletons after his death"). [8] Even a cursory review of the transcript in this case reveals that is exactly what the Plaintiffs/Appellees did.

Because the courts with opposing views have limited their reasons for finding that probable cause alone can invalidate a forfeiture clause, many courts have easily dismissed the opposing rationale. The primary, if not the only actual, [9] rationale for disregarding a forfeiture clause solely because the contestant had probable cause or good faith to bring the contest is essentially that "the administration of justice should not be frustrated." *See In re Estate of Cocklin*, 236 Iowa 98, 17 N.W.2d 129, 135 (1945); *see also In re Estate of Seymour*, 93 N.M. 328, 600 P.2d 274 (1979) (the court's function is to determine the testator's intent); ***14** *McMillin Estate*, 1958 Pa. Dist. & Cnty. Dec. LEXIS 341, 15 Pa. D. & C.2d 789 (Pa. C.P., Orphans' Ct. Div. 1958) (a rule disregarding probable cause or good faith would "sometimes not only work manifest injustice, but accomplish results that no rational testator would ever contemplate"); *In re Keenan's Will*, 188 Wis. 163, 205 N.W. 1001 (1925) (there should be no penalty attached to the performance of the administration of justice); *South Norwalk Trust Co. v. St. John*, 92 Conn. 168, 101 A. 961, 963 (1917) (forfeiture clauses prevent the truth from being found); *In re Estate of Hartz*, 247 Minn. 362, 77 N.W.2d 169, 171 (1956) (a forfeiture clause might prevent establishment of a will's invalidity). [10]

The Court of Appeals for the District of Columbia responded to this reasoning best by noting that "[t]he view that the wishes of the testator should be disregarded with respect to the disposition of his property in the interest of greater freedom of litigation does not impress us as resting on a sound or logical basis." *Barry*, 135 F.2d at 473. Furthermore, courts have also responded to the opposing view by noting that a forfeiture clause "does not prevent a contest by the beneficiary under the will. It did not in the case at bar." *Rudd*, 160 N.E. at 886; see also Alper, 65 A.2d at 741. (It certainly did not in this case!) Finally, courts respond to the "administration of justice" reasoning by stating that allowing probable cause or good faith to disregard a forfeiture clause would rarely, if ever, result in justice being disregarded. As noted by the Rudd court,

> ***15** [t]he moral effect of such a clause would be manifest only in instances where the gift of a substantial part of the estate is made dependent on such a condition of which the beneficiary might be deprived by making an unsuccessful contest over the allowance of the will. Such a clause can be operative only in comparatively few cases. If the contest is successful, that clause falls with the rest of the will.

Rudd, 160 N.E. at 886; *see also Dainton,* 658 P.2d at 82 ("To strictly enforce no-contest clauses, [contestant] asserts is to create a device for the unscrupulous to manipulate estates to their benefit. That view pays little respect to the ability of our judicial system to discover any such unscrupulous acts.").

Additionally, the Plaintiffs/Appellees may argue that forfeiture clauses are to be strictly construed. *See Barr,* 158 P.3d at 1075. "While it is true... that a forfeiture clause is to be strictly construed, it is equally true that if the same is not structured [sic - should probably be strictured] by law or by public policy it will be enforced according to the ascertained intent of the testator." *Markham,* 115 P.2d at 870; *see also Westfahl,* 674 P.2d at 23-24.

B. Probable Cause is Not the Standard for the Failure to Enforce the Forfeiture Clauses in this Case

As discussed, *supra,* extensive Oklahoma authority supports the enforcement and validity of forfeiture clauses. Oklahoma courts have, however, identified only limited contests that will not invoke enforcement of forfeiture clauses. Only when a contestant has probable cause to challenge a will *based on (i) forgery, (ii) subsequent revocation by a later will or codicil, or (iii) making a spousal election have* forfeiture clauses not been invoked in Oklahoma. *Wallace,* 219 P.3d at 539, citing *Westfahl,* 674 P.2d at 24; *Rettenmeyer,* 345 P.2d at 877; Judgment,11. However, "where the contest proceeds upon the typical grounds of fraud, undue influence, improper execution or lack of testamentary capacity, the condition ***16** is entirely reasonable and enforceable, *notwithstanding the existence of probable cause* for the contest." *Alper,* 65 A.2d at 740 (emphasis added). This reasoning is consistent with Oklahoma case law.

In *Wallace,* the latest Oklahoma Supreme Court case to address forfeiture clause issues, the Court recited the rule that forfeiture clauses should not be invoked if the contestant has probable cause to challenge the will based on forgery or subsequent revocation. *Wallace,* 219 P.3d at 539. Based upon this rule, the Oklahoma Supreme Court concluded that the district court's holding was not clearly against the weight of the evidence or a governing principle of law, when the district court held that a contestant, who brought a federal court complaint regarding the same trust-contest issues previously litigated in state court, violated the forfeiture clauses *because she had no probable* cause to bring the federal suit. *Id.* [11] The Supreme Court in *Wallace* did not establish the general rule that probable cause alone in filing of a contest relieves the contestant from the impact of the forfeiture clause, and that case has not come before the Oklahoma Supreme Court to date. In fact, in *Wallace,* the Court could have relied on the contestants failure to fit within one of the three ***17** (3) recognized exceptions. The issue presented here has not yet been decided by the Oklahoma Supreme Court.

Denying the enforceability of a forfeiture clause based solely on a trial court's determination that the contestant had "probable cause" in bringing the contest is not, and should not be, the standard in Oklahoma, and the Forfeiture Clauses should have been, and must be, enforced.

III. OKLAHOMA LAW RECOGNIZES ONLY THREE LIMITED EXCEPTIONS TO THE ENFORCEMENT OF FORFEITURE CLAUSES

Defendant/Appellant next poses the question of whether Oklahoma law recognizes any exceptions to the enforcement of Forfeiture Clauses in testamentary instruments other than contests based on (i) a claim of forgery, or (ii) a subsequent revocation by a later will or codicil, or (iii) by a spousal election.

As indicated *supra,* as a general rule, forfeiture clauses in wills and trusts are valid and enforceable in Oklahoma. *Wallace,* 219 P.3d at 539; *Barr,* 158 P.3d at 1075. The only exceptions to this general rule are when a contestant has probable cause to challenge a will based on (i) forgery, (ii) subsequent revocation by a later will or codicil, or (iii) making a spousal election. *Wallace,* 219 P.3d at 539, citing *Westfahl,* 674 at 24; *Rettenmeyer,* 345 P.2d at 877; Judgment at 27. The typical public policy concerns for not enforcing a forfeiture clause based on probable cause in a subsequent revocation by a later will, spousal election

or forgery claim are not present in this case. This case was a frontal attack upon J. Beard's consistent testamentary plan of over 24 years by two of his adult daughters alleging that the undue influence of his wife of over 24 years invalidated that plan.

First, the Oklahoma Supreme Court has set forth the two "tenets" upon which are premised the rule that a forfeiture clause should not be invoked if the contestant has probable ***18** cause to challenge the will based on a subsequent will. The two tenets are: "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." *Westfahl,* 674 P.2d at 25. The Court further states that "[t]here is a *legal obligation* to produce a will for probate by one who has custody of the will. However, an attempt to probate a will, known not to be a genuine instrument, falls within the forbidden behavior of the in terrorem clause, and will result in the sacrifice of the legatee's/devisee's share." *Id.* (emphasis added). In this case, Plaintiffs/Appellees have done just that - they have attempted to establish the validity of a *prior* (not subsequent) will from 1980 (at the time when J. Beard was unmarried) in their attempt to contest the six (6) subsequent Wills and Trusts that reflected J. Beard's testamentary scheme which remained consistent from 1982 until his death in 2006. *See* Defendant's Exhibits 1-6.

Second, in *Rettenmeyer,* the issue was whether a husband, who had received less than his statutory right under the will and therefore had made a spousal election claim, forfeited his right to take under a will when it was ultimately determined that an antenuptial agreement prevented him from making the spousal election claim. Again, the Oklahoma Supreme Court relied on an Oklahoma statute as a public policy reason not to enforce the forfeiture clause. The statute the Court cited states that "no spouse shall bequeath or devise away from the other so much of the estate of the testator that the other spouse would receive less in value than would be obtained through succession by law." *Rettenmeyer,* 345 P.2d at 877, citing 84 Okla. Stat. § 44. The Court concluded "[t]o hold [that] the election was a violation of the 'no contest' clause in the codicil would render nugatory the quoted statutory provision and deter ***19** parties from seeking their lawful rights." *Id.* Unlike in *Rettenmeyer,* there is no statutory provision granting a parent's children any rights to or in his or her estate. In fact, in Oklahoma children have no minimum interest in a parent's estate upon the parent's death. *Benjamin v. Butler (In re Estate of Jackson*), 2008 OK 83, 194 P.3d 1269, 1274-1275 (2008). It simply is not a protected interest or public policy of this State.

Finally, although the *Westfahl* court set forth the rule that a claim of forgery is an exception to the enforcement of a forfeiture clause, no reported Oklahoma appellate decision has actually addressed such an issue with such facts. The *Westfahl* opinion focuses on the issue of a subsequent will, but cites to Alper for the rule regarding a forgery case. *Id.* According to *Alper,*

> the public has an interest in the discovery of the crime of forgery, if such there was. Apart from the foregoing considerations, it is considered that a claim of forgery or of subsequent revocation by a later will or codicil is usually based upon evidence far more definite in character than the shadowy lines of demarcation involved' in mental capacity, undue influence or fraud, and is less likely to be employed as a means of coercing a settlement.

Alper, 65 A.2d at 740. None of the stated public policy reasons set forth above applies to the present case, and the Forfeiture Clauses should have been, and must be, enforced.

IV. THE FORFEITURE CLAUSES MUST BE ENFORCED

Defendant/Appellant's third issue on appeal is whether the trial court erred in failing to enforce the Forfeiture Clauses when Plaintiffs/Appellees contest to the John M. Beard testamentary instruments was not based on (i) a forgery (regarding the testamentary instruments), or (ii) a subsequent revocation by a later will or codicil, or (iii) by a spousal election. The trial court did err and the Forfeiture Clauses must be enforced.

***20** "A forfeiture clause is an executory limitation which is employed to effect testamentary intention, and its use is within the province of the testator if it does not contravene public policy or a rule of law." *Westfahl,* 674 P.2d at 23-24, citing *Alper,* 65 A.2d at 739.

A. The Forfeiture Clauses Do Not Contravene Public Policy

There is no principle of public policy that serves to invalidate the Forfeiture Clauses in this case, even if the Plaintiffs/Appellees' contest had been filed in good faith and based upon probable cause.

As discussed, *supra,* the failure to enforce a forfeiture clause based solely on probable cause is improper *because it is against public policy. See, e.g., Bender,* 168 N.E. 574; *In re Estate of Miller,* 103 P. 842; *Larson,* 700 P.2d 276; *Rudd,* 160 N.E. 882; Alper, 65 A.2d 737; *Barry,* 135 F.2d 470. Further, the typical public policy concerns for not enforcing a forfeiture clause based on probable cause in a forgery, subsequent will, or spousal election claim are not present in this case. *Westfahl,* 274 P.2d at 25; *Rettenmeyer,* 345 P.2d at 877; *Apler,* 65 A.2d at 740.

Enforcement of the Forfeiture Clauses does not contravene any Oklahoma public policy and the Forfeiture Clauses must be enforced. *Westfahl,* 674 P.2d at 23-24.

B. Enforcement of the Forfeiture Clauses Does Not Contravene a Rule of Law

1. Plaintiffs/Appellees Contested the Wills and Trusts

In the present case, Plaintiffs/Appellees undoubtedly contested the Wills and Trusts. See Petition; Judgment at 12. A "contest," when pertaining to a forfeiture clause, means "any legal proceeding designed to result in the thwarting of the testator's wishes as expressed in the will." *Westfahl,* 674 P.2d at 24. "Using a similar definition, other courts have held ***21** that attacking the mental capacity of the testator or seeking to have the estate declared as community property are clearly contests." *Barr,* 158 P.3d at 1075.

The existence of a will or trust contest is determined on a case-by-case basis. *Id.* "Each will must be construed by examining the peculiar surrounding circumstances, the language employed, and the intention of the testator gathered from the general situation." *Westfahl,* 674 P.2d at 24. ***J. Beard's intention to enforce the Forfeiture Clauses was clear.*** Tr.Vol.5 at 722.

"The meaning of the words used by the testator and the consideration of the purpose is the determinative factor in ascertaining whether the proceedings constitute a will contest within the purview of the no contest clause. The intention of the testator is controlling; when the court construes a will, it must ascertain and give effect to the testator's intent, unless the intent attempts to effect what the law forbids." *Zarrow,* 688 P.2d at 50, citing *Westfahl,* 674 P.2d at 24. During trial, J. Beard's friend for over seventy (70) years, Dr. Joseph Hoffman, testified as follows:
Q. Did John Beard tell you what his wills or trusts provided in the event that there was a contest over the trust?

A. Yes.

Q. What did he tell you?

A. He told me that he always had the phrase -- always is a long word -- but he put the phrase in that anybody that contests the will is out. He did that many, many times. And he told me that many times. And he was very serious about that.

Tr.Vol.5 at 722. Plaintiffs/Appellees offered no testimony or evidence contradicting this testimony or calling its veracity into question.

***22** "Attendant circumstances may be contemplated to perceive the testator's true intent and the testator's feelings toward the beneficiary named in the will." Westfahl, 674 P.2d at 24. Again, the testimony of Dr. Joseph Hoffman, J. Beard's long-time friend, is telling:

Q. Did John Beard ever talk to you about his children?

A. Yes.

Q. What do you recall John Beard saying about his children?

A. This is a little hard for me to say, but I think that the times that he mentioned about his children that he was pretty disappointed with their attitude towards him and with their dealings with him. And they they were -- I think I've said before, that they -- he said that they looked on him as a cash cow and that they were primarily interested in money, and that he was very disappointed in what they -- how they reflected on him as a father. And he also pointed out that it was mainly Elly who -- who got those children back to where they were seeing their father more often and was on a more congenial basis. And that was due to Elly. It wasn't due to John.

Tr.Vol.5 at 720-721.

"Based upon the weight of the evidence," the trial court concluded that J. Beard "was disappointed in his relationship with Plaintiffs and this was clearly expressed to them through written correspondence throughout his life. [J. Beard] expressed to the Plaintiffs that he believed they were primarily interested in him because of his money." Judgment at 4-5. Based upon the vigorous, if not vicious, attacks Plaintiffs/Appellees made against J. Beard and E. Beard, their claims to invalidate the Wills and Trusts, the attendant circumstances surrounding J. Beard's relationship with them, and J. Beard's expressed intent in including the Forfeiture Clauses in his testamentary documents, there is no doubt that this case was a "legal proceeding designed to result in the thwarting of the testator's wishes as expressed in the will." *See Westfahl,* 674 P.2d at 24.

***23 2. The Plaintiffs/Appellees' Contest is Not Protected by a Legally Recognized Oklahoma Exception**

As indicated supra, forfeiture clauses in wills and trusts are valid and enforceable in Oklahoma. *Wallace,* 219 P.3d at 539; *Barr,* 158 P.3d at 1075. The only exceptions to this general rule that Oklahoma recognizes are when a contestant has probable cause to challenge a will based on (i) forgery, (ii) subsequent revocation by a later will or codicil, or (iii) making a spousal election. *Wallace,* 219 P.3d at 539, citing *Westfahl,* 674 at 24; *Rettenmeyer,* 345 P.2d at 877. None of those exceptions applies here.

In this case, J. Beard's daughters never claimed that any of the Wills and Trusts were forgeries. *See* Petition. Likewise, his daughters never asserted that there was any subsequent will or trust revoking the Wills and Trusts. *Id.* Finally, this case did not involve any spousal election. *Id.*

No contest clauses are binding on a legatee or devisee. *Westfahl,* 674 P.2d at 23-24. Plaintiffs/Appellees cannot rely on any legally recognized exception to the general rule that forfeiture clauses are valid and enforceable in Oklahoma, and they have clearly contested the Wills and Trusts. The Forfeiture Clauses do not contravene Oklahoma public policy or a rule of law and they must, therefore, be enforced.

V. THE TRIAL COURT'S FINDING OF PROBABLE CAUSE WAS CLEARLY AGAINST THE WEIGHT OF THE EVIDENCE

To the extent this Court holds that Oklahoma does recognize that probable cause and good faith alone in the filing of a will contest prohibit enforcement of forfeiture clauses, the trial court erred in finding that Plaintiffs/Appellees had probable cause to contest the Wills and Trusts. In fact, the evidence in this case is far less convincing of probable cause than in other cases where probable cause was not found.

***24** In *Russell v. Wachovia Bank, N.A.*, 370 S.C. 5, 633 S.E.2d 722 (2006), the trial court found that although the contestant's claim for undue influence was unfounded, the contestant did have probable cause to bring his suit and therefore refused to enforce the forfeiture clause. The Supreme Court of South Carolina reversed on the forfeiture clause issue, finding that the contestant did not have probable cause to bring the suit. *Id.* In support of its ruling, the trial court cited the strife and discord of the family, and "the belief" from the contestants that they were treated less advantageously under the estate plan than they believed the testator intended. The South Carolina Supreme Court rejected such "belief" as constituting probable cause.

This case is even more troubling. **The trial court in this case cited no factual finding in support of her holding that "probable cause existed."** Judgment at 27. In fact, there are no findings of fact whatsoever in the Judgment that indicate why the trial court made such a holding. *See* Judgment. To the contrary, particularly telling is the testimony at trial of one of the two Plaintiffs/Appellees, Elizabeth Roesler. At trial, Ms. Roesler was asked a series of questions regarding any evidence she had regarding any of the claims she had made in the Petition. Ms. Roesler was unable to provide any direct evidence for the several claims she had alleged against E. Beard. *See* Tr.Vol.2 at 261-271.

The only possible reasons upon which the trial court here could have found Plaintiffs/Appellees had probable cause to contest the Wills and Trusts are likely the same or similar reasons cited by the trial court in *Russell.* The South Carolina Supreme Court, though, disagreed with such reasoning, holding that "[f]amily discord and strife, coupled with a less-than-favorable inheritance, do not constitute probable cause. Moreover, the fact that Testator did not announce that the [parties whom the contestant claims unduly ***25** influenced the testator] would share in the estate is not reason to believe [the contestant] was unduly influenced to favor them." *Russell*, 633 S.E.2d at 727.

The Russell court determined that the testator's physical and mental health, capability of executing testamentary documents, unsupervised visits with friends and business associates, and continued service as a federal judge should have dispelled any suspicions that the testator was unduly influenced. *Id.* at 728. Similarly, in this case, J. Beard's physicians and friends had no alarm for his physical and mental health as they related to any of the claims made by his daughters. Defendant's Exhibit 211i at 152-153, 204-207; Defendant's Exhibit 211j at 22-23, 34; Tr.Vol.6 at 833, 847; Tr.Vol.7 at 917-918, 932-933; Judgment at 4, 6. In addition, J. Beard was fully capable of executing testamentary documents; had unsupervised visits with friends, family and business colleagues on numerous occasions; and continued to run his successful oil business until his death. Defendant's Exhibit 211a at 27, 43; Defendant's Exhibit 211i at 151; Tr.Vol.5 at 678, 703-704, 716-717, 743; Tr.Vol.6 at 777-778, 813; Tr.Vol.7 at 1036-1037; Judgment at 2, 4, 26.

As the *Russell* court ultimately held,

> the no-contest clauses in both the will and trust are valid and enforceable. To hold otherwise would undermine Testator's intent. See Matter of Clark, 308 S.C. 323, 417 S.E.2d 856 (1992) (explaining that the cardinal rule for interpreting and construing a will is the determination of the testator's intent).

Russell, 633 S.E.2d at 728.

The court in *Barry v. American Sec. & Trust Co.*, 135 F.2d 470, 472-473 (D.C. Cir. 1943) also found a lack of probable cause. *Barry*, 135 F.2d 470. In that case, the contestant filed a contest to the will claiming mental incapacity, fraud, coercion, undue influence and lack of execution. The contestant attempted to invalidate provisions in his aunt's will that provided for an unrelated and unmarried young man, Murphy.

***26** At trial, the facts revealed that the testatrix was of advanced age, but there was no evidence of her mental weakness or other mental incapacity. Instead, the evidence showed she was strong willed and had a determined character. The evidence also revealed that Murphy showed the testatrix great care and attention, aided her in her business affairs, cared for her in her illness and visited her often. To the contrary, the contestant seldom saw the testatrix. *See Barry,* 135 F.2d 470.

No evidence was presented that Murphy substituted his will for the testatrix's will. Furthermore, the testatrix wrote the will provisions in her own handwriting and consulted with a trust company about her will in the absence of Murphy. However, the evidence did reveal that Murphy possibly cultivated the friendship of the testatrix with the expectation of profit and even copied the testatrix's notes into the form of the will. Even with this evidence, the court concluded that "there was not a scintilla of evidence" to justify the contestant's allegations. *Id.* at 471.

Evidence of the claims asserted by J. Beard's daughters in this case was even less convincing than in *Barry*. First, the only persons testifying on behalf of the daughters were the two daughters themselves, one of their children, their expert witness and a physician of J. Beard who testified that J. Beard was of sound mind and not easily influenced by others. Defendant's Exhibit 211j at 18-19, 28, 34.

Although Plaintiffs/Appellees went to great lengths to offer evidence of J. Beard's medical history and episodic binge drinking, most of this evidence was obtained through discovery after they had filed their Petition, and there was no evidence whatsoever of any mental incapacity of J. Beard. Judgment at 26. No person, with the exception of the two daughters themselves, testified of J. Beard's weak mind or diminished will, and their own ***27** expert refused to claim J. Beard lacked mental capacity. *See* Court's Exhibit 1. To the contrary, a number of witnesses close to J. Beard testified of J. Beard's strong will and mental capacity. Defendant's Exhibit 211i at 151; Defendant's Exhibit 211j at 18-19, 34; Tr.Vol.5 at 748, 757; Tr.Vol.7 at 939, Judgment at 4. In fact, following the Plaintiffs/Appellees' case-in-chief, the trial court granted Defendant/Appellant's demurrer to the evidence on J. Beard's lack of testamentary capacity, "because of the failure of [Plaintiffs/Appellees] to prove [J. Beard's] lack of testimonial capacity." *See* Judgment at 26.

Additionally, there was absolutely no evidence presented that E. Beard ever exerted her will over J. Beard's will in the drafting and execution of the Wills and Trusts. Judgment at 5, 6, 9, 11. Instead, testimony from each of J. Beard's attorneys and his accountant who advised J. Beard regarding his estate plan revealed that J. Beard was not acting under the influence of any other person when discussing or executing his testamentary documents. Defendant's Exhibit 211a at 10, 12-13, 15-16, 18-19; Trial Transcript Vol.5 at 671, 675, 678; Tr.Vol.6 at 809-810; Tr.Vol.7 at 1027-1034; Judgment at 9-11.

Further, E. Beard not only cared for and took care of J. Beard, like the defendant in the *Barry* case, but she also loved him, was his wife of over 24 years, and entered into her relationship with him with no expectation of profit. Defendant's Exhibits 69, 76; Tr.Vol.1 at 156; Tr.Vol.5 at 718; Tr.Vol.6 at 807-808, 850-851; Judgment at 2, 3. Also, as in *Barry*, J. Beard's children seldom saw or visited him. Judgment at 2, 4.

There was no evidence that E. Beard ever breached "her fiduciary duty." In fact, the trial court clearly, and publically, questioned Plaintiffs/Appellees' baseless theory upon which they claim E. Beard breached a fiduciary duty. *See* Tr.Vol.5 at 641-645. ***28** Plaintiffs/Appellees' claim for fraud was so unfounded that the trial court sustained Defendant/Appellant's demurrer to the evidence on that claim. See Judgment at 22. Similarly, there was no evidence presented at trial to prove E. Beard made any fraudulent conveyance and the daughters do not even attempt to appeal such issue to this Court. Further, to the extent Oklahoma would even recognize a claim for interference with expectation of inheritance (it has not done so to date), the daughters offered no evidence that showed E. Beard intentionally or wrongfully interfered with any inheritance expectation. Finally, Plaintiffs/Appellees offered no evidence of E. Beard's supposed reckless disregard for their rights which would support a claim for punitive damages.

Unless this Court invokes the implicit "probable cause" analysis previously advanced in the malicious prosecution cases and the good faith pleading requirements of 12 Okla. Stat. § 2001 to support and justify the trial court's finding that "probable cause"

existed, then it must be determined that the Plaintiffs/Appellees did not have probable cause to contest the Wills and Trusts and the trial court's ruling was against the great weight of the evidence. This Court can, and should, make the ruling that the trial court refused. There should be no "baby splitting" in these will and trust contests. There is, and should be, definite consequences to a contestant's actions which blatantly disregard and openly defy the expressed will of the testator. No child has a vested right of inheritance. In this case, $1,220,000.00 was ***not enough*** for these two daughters who had also received millions over the lifetime of their father. J. Beard correctly assessed his daughters' monetary interests in him. Their open defiance of and opposition to his testamentary plan merits the enforcement of the Forfeiture Clauses and strongly reinforces Oklahoma's public policy of validating the ***29** expressed intent of the testator. J. Beard wanted the Forfeiture Clauses to be enforced and they should be.

CONCLUSION

This Court should reverse the judgment of the trial court refusing to enforce the Forfeiture Clauses and render judgment in favor of the Appellant, Elly Beard, Trustee of the John M. Beard Trust, enforcing the Forfeiture Clauses as set forth in the testamentary instruments of the decedent, John M. Beard, and disallowing any distribution to the Plaintiffs/Appellees under the terms thereof.

Footnotes

1 Defendant/Appellant submits her Brief in Chief without the benefit of a Response to her Petition in Error by the Plaintiffs/Appellees as required pursuant to Okla.Sup.Ct.R. 1.25(c).

2 J. Beard executed two prior trusts, which provided similar bequests as the 98 Trust, on November 6, 1992 (the "92 Trust") and on February 16, 1994 (the "94 Trust" and together with the 92 Trust and the 98 Trust, the "Trusts"). Defendant's Exhibits 4-5; Judgment at 9-10.

3 Similar forfeiture provisions are contained in the 92 Trust (Section 10.08) and the 94 Trust (Section 10.08). Defendant's Exhibits 4-5; Judgment at 12.

4 J. Beard executed two prior wills, which materially provided similar bequests as the 92 Will, on June 11, 1982 (the "82 Will") and on January 23, 1986 (the "86 Will" and together with the 82 Will and 92 Will, the "Wills"). Defendant's Exhibits 1-2; Judgment at 8-9.

5 Similar forfeiture provisions are contained in the 82 Will (Article V) and the 86 Will (Article V). Defendant's Exhibits 1-2; Judgment at 12.

6 The United States Supreme Court, in cases of federal cognizance, has held that forfeiture clauses are to be enforced regardless of whether the contestant had good faith or probable cause. *Smithsonian Institution v. Meech, 18 S. Ct. 396. See also Barr, v. American Sec. & Trust Co.,* 135 F.2d 470, 472 (D.C. Cir. 1943) ("In the District of Columbia, the law is settled in accordance with the weight of authority, we think, by Smithsonian Institution v. Meech ... that a provision avoiding a disposition of property for action of the beneficiary in contesting the will is valid and will be enforced notwithstanding good faith and probable cause in making the contest.")

7 Alper was overruled in *Haynes v. First Nat'l State Bk. of N. J.,* 87 N.J. 163, 432 A.2d 890, 902-903 (1981), solely because a later state probate code provided that forfeiture clauses would no longer be valid if probable cause existed to contest a will. However, the Oklahoma Supreme Court cited to Alper after the holding in Haynes. *See Westfahl,* 675 P.2d at 23-24. Further, many out-of-state authorities confirm the reasoning in Alper, including *Tunstall v. Wells,* 144 Cal. App. 4th 554, 570 (Cal. App. 2d Dist. 2006); *Larson v. Naslund,* 73 Ore. App. 699, 700 P.2d 276 (Or. Ct. App. 1985); *Commerce Trust Co. v. Weed,* 318 S.W.2d 289 (1958).

8 Additional policy issues set forth by courts include (i) that studies show few undue influence cases succeed (*see Barry,* 135 F.2d at 473) and (ii) if a beneficiary takes under the will, he cannot then reject other parts of the will (*see Rossi v. Davis,* 345 Mo. 362, 133 S.W.2d 363, 372 (1939)).

9 Other courts have held that (i) the forfeiture clause in the particular case was not intended to include a contest under probable cause conditions or (ii) the generic statement "that such condition would be contrary to public policy." *See Burtman v. Butman,* 97 N.H. 254, 85 A.2d 892, 894-895 (1952). Courts have also invalidated forfeiture clauses based on probable cause when a state statute so requires. See Haynes 432 A.2d at 902-903. Further, some courts adopting this line of reasoning cite no rationale whatsoever they just do it. *See Colo. Nat'l Bank v. McCabe,* 143 Colo. 21, 252 P.2d 385 (1960); *Whitehurst v. Gotwalt,* 189 N.C. 577, 127 S.E. 582 (1925); *In re Estate of Chappell,* 127 Wash. 638, 221 P. 336 (1923).

10 The Tate and *South Norwalk* courts have taken this rationale one step further by noting that "[i]f, on contest, the will would have been held invalid, the literal interpretation of the forfeiture provision has suppressed the truth and impeded the true course of justice. If the will should be held valid, no harm has been done through the contest, except the delay and the attendant expense." *Tate v. Camp,* 147 Tenn. 137, 245 S.W. 839 (1922); *see also South Norwalk Trust Co.,* 101 A. at 963. The actual affects of forfeiture provisions,

however, are completely opposite from this flippant statement. For example, in this case, if the testamentary instruments would have been held invalid, the forfeiture clauses would not have suppressed the truth or impeded justice, as the Plaintiffs/Appellees filed suit with express knowledge of the Forfeiture Clauses. Tr.Vol.2 at 327-329. Furthermore, great harm has been done to E. Beard and the legal system in validating the Wills and Trusts. Litigation has been ongoing since March 2008, resulting in a great amount of the Court's and E. Bear's time and resources. Attorneys' fees and expert witness costs for E. Beard alone have exceeded $496,816.27 in defending this case. E. Beard has been forced to defend false and, in some instances, outrageous claims, about which Plaintiffs/Appellees' own expert witness would not even testify. See Court's Exhibit 1 (wherein Plaintiffs/Appellees' sole expert, Dr. Robert Granacher, refused to testify that J. Beard lacked testamentary capacity).

11 Although *Barr v. Dawson,* 158 P.3d 1073, an Oklahoma Court of Civil Appeals case decided before Wallace, failed to invoke the applicable forfeiture clause because "the spousal election made in [that] case was made in good faith and with probable cause," the probable cause argument made by the Barr Court was based on an incorrect interpretation of the Westfahl case. *Barr,* 158 P.3d at 1076. The Barr Court cites *Westfahl* for the proposition that "the consensus rule is that the forfeiture clause should not be invoked if contestant had probable cause..." *Id.* The Barr Court failed to complete the sentence (which ends "...to challenge the will based on forgery or subsequent revocation by a later will or codicil"). *Westfahl,* 674 P.2d at 24. As the Supreme Court in Wallace noted, "Westfahl identified and adopted the rule that a forfeiture clause should not be invoked if the contestant has probable cause to challenge a will based on forgery or subsequent revocation by a later will or codicil." *Wallace,* 219 P.3d at 539. The court also attempts to assert additional reasoning for not invoking the forfeiture clause in that case, but the court merely states that "[t]o allow invocation of the no contest clause under the facts in this case would be unconscionable and would invoke the doctrine of equitable estoppel." The court does not cite any authority that either unconscionable behavior or the doctrine of equitable estoppel warrants disregard of forfeiture clauses, and no authority exists in Oklahoma for either rule. Nonetheless, the facts in this case are certainly not unconscionable. Further, there was no evidence that meets the elements of an equitable estoppel, because there is no evidence in the record that E. Beard made any false representation or concealed any facts in this case. *See Gypsy Oil Co. v. Marsh,* 1926 OK 246, 248 P. 329, 335 (1926); *see also Sullivan v. Buckhon Ranch P'ship.,* 2005 OK 41, 119 P.3d 192 (2005) (equitable estoppel is used to prevent injustice and should not be used to work a positive gain to a party).

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