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IN THE SUPREME COURT OF MISSOURI

SAMUEL KNOPIK,	)	
	)	
Appellant,	)	
	)	
v.	)	**Case No. SC97985**
	)	
SHELBY INVESTMENTS, L.L.C.,	)	
	)	
Respondent.	)	

ON APPEAL FROM THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
Honorable Mark A. Styles, Division 19
Circuit Court Case No. 17P8-PR1016
Court of Appeals, Western District, Case No. WD81931

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This appeal is timely filed, and seeks review and reversal of the trial court's final order and judgment in Case No. 17P8-PR1016 in the Circuit Court of Jackson County, at Kansas City, entered July 9, 2018. The Court of Appeals, Western District, had jurisdiction under R.S.Mo. § 512.020, and this case was within the general appellate jurisdiction of that Court pursuant to Article V, Section 3 of the Missouri Constitution. The case was properly before the Court of Appeals as it does not invoke the validity of any treaty or statute of the United States, and Appellant Samuel Knopik does not challenge the validity on its face of any statute or provision of the Constitution of this State, or any other matter within the exclusive or original jurisdiction of the Supreme Court of Missouri.

The Court of Appeals handed down its opinion on May 14, 2019. (A9-A16). The Court of Appeals affirmed the judgment of the trial court. (A9). After the Court of Appeals denied Appellant's Application for Transfer, Appellant filed an Application for Transfer with the Missouri Supreme Court. By Order of the Missouri Supreme Court dated September 3, 2019, the Application was granted and the matter was ordered transferred. Mandate was issued by the Court of Appeals on September 4, 2019, ordering that the cause be transferred to the Missouri Supreme Court.

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INTRODUCTION

This case involves the proper limits of no-contest clauses in trust instruments under Missouri law. This Court has long recognized the validity of no-contest clauses. And this Court has repeatedly recognized that no-contest clauses are properly applied when a beneficiary of a trust seeks to challenge the trust instrument. However, this Court has not previously addressed the separate question of whether a no-contest clause may properly be applied to an action involving breach of trust or removal of a trustee. In such actions, the beneficiary is not seeking to challenge the trust instrument. Rather, the trustee is seeking to protect the trust and its corpus by taking action to force the trustee to act consistently with the terms of the trust and Missouri law.

As explained herein, the common rationale for no-contest clauses – that one who takes under a trust may not also challenge the trust – does not apply when the action is one that seeks to protect the trust. Furthermore, the notion that a no-contest clause could be applied to bar an action for breach of trust or removal is contrary to Missouri law in numerous respects. Thus, it would be appropriate on multiple bases for this Court to rule that no-contest clauses simply do not apply when the action is one for breach of trust or removal (as opposed to an action which challenges the trust instrument).

This case also raises the issue of whether Missouri should adopt a good faith/probable cause exception to no-contest clauses. This Court has also previously ruled, in a series of cases dating back sixty years, that Missouri does not recognize a good faith/probable cause exception to the enforcement of no-contest clauses. A good faith/probable cause exception provides a beneficiary limited protection from forfeiture, by providing that a beneficiary who brings an action regarding a trust with good reason to believe that the action is appropriate (i.e. in good faith or with probable cause), does not forfeit his interest under a trust merely by virtue of having brought the action. Most states now recognize such an exception. And, as explained herein, there is good reason for this Court to reexamine its prior cases and recognize such an exception.

In short, Appellant is asking this Court to make new law and/or modify existing law. Specifically, Appellant is asking this Court to take one or both of the following actions:

1. Hold that no-contest clauses may only be applied to actions which seek to challenge a trust instrument, and that no-contest clauses do not apply to actions for breach of trust and/or removal of a trustee.
2. Hold that no-contest clauses are subject to a good faith/probable cause exception.

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This Court would be well-founded in issuing both of these holdings, in that these holdings would be consistent with modern trends in American law. In addition, these holdings would be consistent with recent trends in Missouri law, as established by the standards adopted in the Missouri Uniform Trust Code ("MUTC").

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STATEMENT OF FACTS

This appeal involves the Knopik Irrevocable Trust ("the Trust"). (D3). The Trust was created on December 21, 2016. (D32 p. 1). Shelby Investments, L.L.C. ("Trustee") is the sole trustee of the Trust. (D32 p. 1). Samuel S. Knopik ("Beneficiary") is the sole beneficiary of the Trust. (D32 p. 1). Section 2 of the Trust provides:

> During Sam Knopik's lifetime, each month, on the first business day of the month, beginning in December 2016 and ending in December 2020, the Trustee shall distribute to Sam Knopik One Hundred Dollars ($100.00) from the trust estate. The Trustee shall add any undistributed net income to principal. On January 4, 2021, the Trustee shall distribute the remaining trust estate to the Settlor, terminating the trust.

(D32 pp. 1-2). The Trustee admits that this Section requires Trustee to make monthly payments of $100.00 to Beneficiary, and that this requirement is mandatory, not discretionary. (D26 p. 1).

Pursuant to the Trust, Trustee made a single payment of $100.00 to Beneficiary in February 2017. (D32 p. 2). Since February 2017, Trustee has made no further distributions to Beneficiary under the Trust. (D32 p. 2). Furthermore, Trustee has affirmatively indicated that it does not intend to make any additional payments to Beneficiary under the Trust. (D32 p. 2; D27 p. 1).

Given Trustee's failure and refusal to make the required monthly payments under the Trust, Beneficiary filed a Petition against Trustee for breach of trust and

removal on August 18, 2017. (D2). In that Petition, Beneficiary asked the Court to find that by refusing to make the mandatory payments required by the Trust, Trustee had breached its fiduciary duties, and removal was warranted by this continuing breach. (D2 pp. 2-3; D32 p. 2).

On November 14, 2017, Trustee filed its Answer and Counterclaim. (D5). In its Counterclaim, Trustee alleged that by filing his Petition, Beneficiary had triggered the no-contest clause found in Section 12 of the Trust ("No-Contest Clause"). (D5 p. 23; D3 p. 3). The No-Contest Clause reads as follows:

> In case any beneficiary shall (i) contest the validity of this trust, or any provisions thereof, in whole or in part; (ii) make a claim against a trustee for maladministration or breach of trust; or (iii) attempt to remove a trustee for any reason, with or without cause; then such contest or claim and such attempt shall cancel and terminate all provisions for or in favor of the beneficiary making or inciting such contest or claim, without regard to whether such contest or claim shall succeed or not; and all and any provisions or provision herein in favor of the beneficiary so making such contest or claim, or attempting or inciting the same, to be revoked and of no force and effect;' and the entire trust estate shall revert to the Settlor and be distributed to thee Settlor.

(D3 p. 3; D5 p. 4). Trustee requested a declaration of the Circuit Court that, by filing his Petition to enforce the basic terms of the Trust, Beneficiary had forfeited all interest in the Trust by virtue of the No-Contest Clause. (D5 p. 5). Beneficiary filed his Response to Counterclaim on November 30, 2017. (D6).

On January 31, 2018, Beneficiary filed a motion for summary judgment, seeking judgment in his favor on his claims for breach of trust and removal. (D7).

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In his memorandum in support of summary judgment, Beneficiary explained that because Trustee was admittedly refusing to comply with the basic requirements of the Trust, it would be appropriate for the Circuit Court to find that Trustee had breached its fiduciary duties, and to remove Trustee. (D9 pp. 3-7). Trustee admitted each and every one of the facts alleged in support of Beneficiary's motion for summary judgment. (D18).

On February 2, 2018, Trustee filed a motion for summary judgment, seeking a declaration from the Circuit Court that Beneficiary had forfeited all interest under the Trust by filing his Petition. (D10). In his memorandum in support of summary judgment, Trustee argued that Beneficiary could not pursue claims for breach or removal no matter how egregious the conduct of Trustee, and that any effort to address Trustee's misconduct would result in forfeiture pursuant to the No-Contest Clause. (D11 pp. 3-6). There was no dispute regarding the facts that served as the basis for Trustee's motion. (D24 pp. 1-3).

On July 9, 2018, the Circuit Court issued its Judgment granting Trustee's motion for summary judgment. (D32). In its Judgment, the Circuit Court ruled that "all of the pertinent facts in this case are undisputed." (D32 p. 1). The Circuit Court further recognized that the sole issue of dispute was enforcement of the No-Contest Clause, essentially conceding that Beneficiary would be entitled to relief against Trustee if the No-Contest Clause did not apply to the claims in issue. (D32 p. 3).

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In its Judgment, the Circuit Court recognized that "[t]he grantor's intent must be ascertained primarily from the trust instrument as a whole, and no clause in the trust is given undue preference." (D32 p. 5). However, the Court then gave the No-Contest Clause precedence over all other portions of the Trust, citing Commerce Trust Co. v. Weed, 318 S.W.2d 289 (Mo. 1958) for the proposition that "no-contest clauses are enforceable without exception." (D32 p. 5). Relying upon Cox v. Fisher, 322 S.W.2d 910 (Mo. 1959), the Court indicated that "Missouri does not recognize an exception to the enforceability of a no-contest clause in cases where the clause has been triggered by actions of a beneficiary." (D32 p. 5).

Based upon the decisions in Commerce Trust and Cox, the Circuit Court reached the following conclusions:

> That the filing of Petition by Petitioner violates the "No-Contest" clause of the Trust.
>
> * * *
>
> That the "No-Contest" clause of the Trust contains provisions that prohibit Petitioner from making a claim against Respondent for maladministration or breach of trust, as well as attempting to remove a Respondent as trustee for any reason, with our without cause.
>
> * * *
>
> That the "No-Contest" clause succinctly states that any attempt to remove a trustee for any reason, with our without cause, is a contest and that such contest shall cancel and terminate all provisions for or in favor of the beneficiary.

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(D32 pp. 5-6). The Court acknowledged some of the arguments that Beneficiary had made in opposition to summary judgment:

> Petitioner argues that the "No-Contest" clause should not be construed as applying to actions pertaining to administration of Trust. Petitioner also argues that the "No-Contest" clause is an exculpatory clause, and therefore, subject to the statutory limitations that apply to exculpatory clauses, and that there should be a distinction between challenging a trust and enforcing a trust.

(D32 p. 6). However, the Court concluded that while Beneficiary's points were valid, they were inconsistent with existing Missouri law:

> [W]hile these points [are] well taken, they are not supported by Missouri law. The Missouri Supreme Court has already considered whether exceptions to "no contest" clauses in wills and other probate documents should be recognized and allowed.

(D32 p. 7). The Court indicated that it believed its analysis was constrained by the existing Missouri Supreme Court cases:

> [T]he Court in Commerce Trust Co. considered all of the arguments as to why "no contest" clauses should not be enforced when there is "good faith and probable cause" to challenge a will or, as in this case, a trust. Commerce Trust Co. v. Weed, at 301. Even after considering all arguments, that Court still found that no contest or forfeiture clauses are enforceable.

(D32 p. 7).

On May 14, 2019, the Missouri Court of Appeals, Western District ("Appellate Court"), issues its Opinion in this matter. (App. A9-A16). In its Opinion, the Appellate Court noted that "[t]he Missouri Supreme Court has long recognized the validity and enforceability of no-contest clauses in trusts and wills."

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(App. A12). In support of that conclusion, the Appellate Court cited this Court's prior decisions in Cox v. Fisher, 322 S.W.2d 910 (Mo. 1959), Commerce Trust Co. v. Weed, 318 S.W.2d 289 (Mo. 1958), and Rossi v. Davis, 133 S.W.2d 363 (Mo. 1939). (App. A12).

In its Opinion, the Appellate Court acknowledged Beneficiary's argument that Cox and Commerce Trust are not controlling because neither of those cases addressed the enforceability of no-contest clauses when the action only pertained to conduct of the trustee, and did not challenge the trust instrument. (App. A13). The Appellate Court agreed that Cox and Commerce Trust did not address this issue, but ruled that the holdings from Cox and Commerce Trust were nonetheless applicable, stating:

> While Knopik is correct that the no-contest clauses in Cox and Commerce Trust did not prohibit challenges to the administration of the instruments at issue in those cases, we do not find that the principles enunciated in those cases are limited to only no-contest clauses that prohibit contests to the validity of the instrument or its provisions.

(App. A14). The Appellate Court concluded that the No-Contest Clause was enforceable, without exception, even in cases where there was no challenge to the trust instrument. (App. A14-A15).

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POINTS RELIED ON

I. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO TRUSTEE BECAUSE THE COURT'S JUDGMENT ERRONEOUSLY CONCLUDED THE NO-CONTEST CLAUSE IS ENFORCEABLE IN THAT THE NO-CONTEST CLAUSE IS NOT ENFORCEABLE FOR THE FOLLOWING REASONS: (1) NO-CONTEST CLAUSES DO NOT APPLY IN CASES INVOLVING TRUST ADMINISTRATION, (2) THE NO-CONTEST CLAUSE SHOULD NOT BE APPLIED TO PREVENT ENFORCEMENT OF THE TRUST, (3) THE NO-CONTEST CLAUSE IS REALLY AN EXCULPATORY CLAUSE WHICH IS SUBJECT TO LIMITIONS, (4) ACTIONS FOR BREACH OF TRUST/REMOVAL DO NOT CONSTITUTE "CONTESTS," (5) A NO-CONTEST CLAUSE MAY NOT ELIMINATE THE CORE DUTIES OF A TRUSTEE, (6) NO-CONTEST CLAUSES SHOULD BE SUBJECT TO AN EXCEPTION IN CASES INVOLVING TRUST ADMINISTRATION, AND (7) NO-CONTEST CLAUSES SHOULD BE SUBJECT TO A GOOD FAITH/PROBABLE CAUSE EXCEPTION.

Labantschnig v. Bohlmann, 439 S.W.3d 269 (Mo. App. 2014)

State ex rel. Nixon v. Hutcherson, 96 S.W.3d 81 (Mo. banc 2003)

In re Estate of Spencer, 417 S.W.3d 364 (Mo. App. 2013)

R.S.Mo. § 456.10-1008.1(1)

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ARGUMENT

I. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO TRUSTEE BECAUSE THE COURT'S JUDGMENT ERRONEOUSLY CONCLUDED THE NO-CONTEST CLAUSE IS ENFORCEABLE IN THAT THE NO-CONTEST CLAUSE IS NOT ENFORCEABLE FOR THE FOLLOWING REASONS: (1) NO-CONTEST CLAUSES DO NOT APPLY IN CASES INVOLVING TRUST ADMINISTRATION, (2) THE NO-CONTEST CLAUSE SHOULD NOT BE APPLIED TO PREVENT ENFORCEMENT OF THE TRUST, (3) THE NO-CONTEST CLAUSE IS REALLY AN EXCULPATORY CLAUSE WHICH IS SUBJECT TO LIMITIONS, (4) ACTIONS FOR BREACH OF TRUST/REMOVAL DO NOT CONSTITUTE "CONTESTS," (5) A NO-CONTEST CLAUSE MAY NOT ELIMINATE THE CORE DUTIES OF A TRUSTEE, (6) NO-CONTEST CLAUSES SHOULD BE SUBJECT TO AN EXCEPTION IN CASES INVOLVING TRUST ADMINISTRATION, AND (7) NO-CONTEST CLAUSES SHOULD BE SUBJECT TO A GOOD FAITH/PROBABLE CAUSE EXCEPTION.

Preservation Statement

This point is preserved for appellate review in that Beneficiary opposed the motion for summary judgment which is the subject of this appeal, and the arguments raised herein were raised in Beneficiary's Memorandum In Opposition To Defendant Shelby Investments, L.L.C.'S Motion For Summary Judgment On Counterclaim For Declaratory Judgment. (D23 pp. 1-43).

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Standard of Review

"This Court's review of an appeal from summary judgment is de novo." Lampley v. Missouri Comm'n on Human Rights, 570 S.W.3d 16, 22 (Mo. Banc 2019). Likewise, when addressing a "purely legal question," the standard of review is de novo. Vacca v. Missouri Dep't of Labor & Indus. Relations, 575 S.W.3d 223, 230 (Mo. Banc 2019).

Arguments and Authorities

Beneficiary contends that Trustee's position regarding the No-Contest Clause is contrary to Missouri law and policy. The idea that a trustee could avoid all responsibility for its own misconduct, simply by invoking a no-contest clause, is directly contrary to Missouri public policy regarding the fiduciary duties of a trustee. As explained herein, no-contest clauses were never intended to insulate trustees from all responsibility for their own misconduct, and any effort to invoke a no-contest clause as a veritable license for misconduct should be rejected by this Court.

When a trustee engages in misconduct that warrants removal, someone must be able to bring that misconduct to the attention of the Court. The only person who could be expected to bring such misconduct to the Court's attention is the beneficiary (the trustee certainly is not going to inform the Court of its own misconduct). Thus, beneficiaries must be free to bring the misconduct of a trustee to the attention of the

Court without fear of losing all interest under the trust that they are trying to protect. If the rule were otherwise, trustees would have free reign to engage in all manner of misconduct, with absolutely no accountability to anyone.

In this case, it is undisputed that Trustee has engaged in misconduct which violates the core terms of the Trust. Furthermore, it is undisputed that Trustee has indicated it has no intention of complying with the terms of the Trust. Given those facts, it is entirely appropriate for Beneficiary to bring an action for breach of trust and removal of Trustee. Any argument that Trustee may invoke the No-Contest Clause to avoid all responsibility for its own misconduct is contrary to both the letter and the spirit of Missouri law.

For the reasons stated below, this Court should hold that a no-contest clause does not apply to an action for breach of trust or removal because such actions do not seek to challenge the trust instrument. Rather, such actions simply seek to protect the trust by enforcing the obligations of the trustee under the trust instrument and Missouri law. This Court should also reexamine its prior case law, and hold that no-contest clauses are subject to a good faith/probable cause exception.

A. Trustee Has Committed A Serious Breach Of Trust.

There is no question that Trustee has committed a serious breach of the Trust that warrants removal.

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The Trust requires Trustee to make monthly payments to Beneficiary. (D26 p. 1; D32 pp. 1-2). The parties agree that this requirement is mandatory, not discretionary. (D26 p. 1). Yet, Trustee has failed and refused to make the required monthly payments to Beneficiary. (D32 p. 2). More than that, Trustee has indicated it has no intention of making the mandatory monthly payments to Beneficiary in the future. (D32 p. 2; D27 p. 1). In short, Trustee has breached a core component of its fiduciary duty to Beneficiary, and Trustee has indicated that it intends to continue this breach into the future.

The MUTC recognizes that "[a] violation by a trustee of a duty the trustee owes to a beneficiary is a breach of trust." R.S.Mo. § 456.10-1001.1. The MUTC further recognizes that the Court may remedy a breach of trust by removing the trustee (among other remedies). R.S.Mo. § 456.10-1001.2. In this case, the uncontroverted facts establish that Trustee has breached its fiduciary duty to Beneficiary, and the facts warrant removal of Trustee. Indeed, the MUTC specifically provides for the removal of a trustee who commits a serious breach of trust and/or who exhibits unfitness, unwillingness, or persistent failure to administer the trust effectively. R.S.Mo. § 456.7-706.

In short, there is no dispute in this case that Trustee has committed a breach of trust, and that this continuing breach of trust warrants removal. The only question is whether Trustee is insulated from all accountability for its misconduct by virtue

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of the No-Contest Clause. For the reasons identified below, the No-Contest Clause should not serve to make Trustee wholly unaccountable.

B. The Decisions In Cox v. Fisher, 322 S.W.2d 910 (Mo. 1959), Commerce Trust Co. v. Weed, 318 S.W.2d 289 (Mo. 1958), And Rossi v. Davis, 133 S.W.2d 363 (1939) Are Not Controlling In Actions Involving Trust Administration.

The Circuit Court concluded its analysis in this case was wholly controlled by this Court's prior decisions in Cox v. Fisher, 322 S.W.2d 910 (Mo. 1959) and Commerce Trust Co. v. Weed, 318 S.W.2d 289 (Mo. 1958). (D32 pp. 5-6). Indeed, the Court indicated that while it believed Beneficiary made good points in his arguments against enforcement of the No-Contest Clause, the Court felt it was constrained by these prior decisions. (D32 p. 6).

Similarly, the Appellate Court noted that "[t]he Missouri Supreme Court has long recognized the validity and enforceability of no-contest clauses in trusts and wills." (App. A12). In support of that conclusion, the Appellate Court cited this Court's prior opinions in Cox, Commerce Trust, and Rossi v. Davis, 133 S.W.2d 363 (Mo. 1939). (App. A12). The Appellate Court acknowledged Beneficiary's argument that Cox and Commerce Trust are not controlling because neither of those cases addressed the enforceability of no-contest clauses when the action only pertains to conduct of the trustee, and does not challenge the trust instrument. (App. A13). And the Appellate Court agreed that Cox and Commerce Trust did not address

that issue. (App. A14). However, the Appellate Court nonetheless ruled that the holdings from Cox and Commerce Trust were applicable, stating:

> While Knopik is correct that the no-contest clauses in Cox and Commerce Trust did not prohibit challenges to the administration of the instruments at issue in those cases, we do not find that the principles enunciated in those cases are limited to only no-contest clauses that prohibit contests to the validity of the instrument or its provisions.

(App. A14). Based upon its reading of this Court's prior opinions, the Appellate Court concluded that the No-Contest Clause was enforceable, without exception, even in cases where there is no challenge to the trust instrument. (App. A14-A15).

Contrary to the rulings of the Circuit Court and Appellate Court, a close review of Cox, Commerce Trust, and Rossi illustrates that the analysis from those cases does not apply under the facts of this case.

In Rossi v. Davis, 133 S.W.2d 363 (1939), this Court addressed a trust that included the following no-contest clause:

> Should any of the parties of the third part, or any one for them, or any of them, institute any action or proceedings of any kind in any court at any time for the purpose of setting aside this instrument, on any ground whatsoever, and be unsuccessful therein, then and in such event said parties of the second part shall pay to each party of the third part instituting such proceeding or directing or assisting in the institution or prosecution of such proceeding, the sum of One Dollar, and all further interest of such party or parties of the third part, or his children and descendants in the property conveyed hereby, and the income thereof, shall cease and in the distribution of the income from said property and the property itself, such party or parties of the third part and his or her children shall not share further, and the share of such party or parties of the third part and their children and descendants shall be paid, assigned, transferred and conveyed by the parties of the second part to the other

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> parties of the third part, excepting said Madeline Rossi, or their children and descendants, in equal parts share and share [alike?], as and when distribution of the portion of said income and property to be paid or distributed to them respectively shall be paid and distributed.

Id. at 370-71. At the time of the grantor's death, one of the beneficiaries of the trust expressed "an intention to 'break it,' or to have it adjudged invalid." Id. at 371. Subsequently, that beneficiary brought an action to attack the validity of the trust instrument. Id. The attempt to have the trust deemed invalid was unsuccessful, and in a subsequent action the trustees sought to enforce the no-contest clause against the beneficiary. Id. at 372. The trial court held that the beneficiary had acted "with the intent and for the purpose of assailing the trust instrument and having it declared invalid." Id. This Court concluded that finding was justified. Id. at 372. This Court further concluded that no-contest clauses are enforceable in Missouri without exception. Id. at 380-81. This Court held that the beneficiary's actions had violated the no-contest clause. Id. at 382.

The facts of Rossi are significantly different from the facts in this case. In Rossi, the beneficiary acted with "the intent and for the purpose of assailing the trust instrument and having it declared invalid." Rossi, 133 S.W.2d at 372. Given those facts, this Court concluded that because the beneficiary had challenged the trust instrument with the intent of having the trust deemed invalid, and had failed in that effort, the beneficiary forfeited her interest under the trust.

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In this case, Beneficiary has not acted with "the intent and for the purpose of assailing the trust instrument and having it declared invalid." To the contrary, Beneficiary is seeking to enforce the terms of the Trust by requiring Trustee to comply with the terms of the Trust, or be removed for refusing to comply. There is nothing in Rossi which indicates a no-contest clause should be enforced against a beneficiary who is merely seeking to enforce the terms of a trust instrument, and is not seeking to challenge the trust instrument.

In Commerce Trust, this Court addressed a will which created a resulting trust, and which included the following no-contest clause:

> 'If any person or persons who are beneficiaries under this my Last Will and Testament shall at any time attempt or aid in an attempt to oppose the administration of this will to probate or to have the same set aside or declared invalid, then and in that event, such beneficiary or beneficiaries shall by that act forfeit all right or title to any part of my estate and any and all bequests I have made to them or their descendants under this will, shall be null and void and my estate shall be distributed in the same manner as it would be distributed under the terms hereof if that person or persons had died prior to my death without leaving lineal descendants.'

Commerce Trust, 318 S.W.2d at 292. Following the death of the testator, one of the beneficiaries challenged the validity of the will on the basis that the testator was of unsound mind and was acting under undue influence at the time the will was executed. Id. at 292-93. That challenge did not result in the will or trust being set aside. Id. at 293. Years later, when the trust was being terminated, the question arose as to whether the heirs of the beneficiary who had challenged the will could

take under the trust. Id. The trial court held that the beneficiary's challenge to the will triggered the no-contest clause, and that the heirs were thereby barred from taking under the trust. Id.

On appeal, the heirs did not deny that the beneficiary had challenged the will, and had sought to have the will set aside. Rather, they argued that the beneficiary had acted in good faith and with probable cause when seeking to set aside the will. Id. at 293-94. This Court rejected that argument, noting that it had previously held no-contest clauses are not subject to an exception for challenges to an instrument which are brought in good faith or with probable cause. Id. at 299-301.

The facts of Commerce Trust are signficantly different from the facts of this case. In Commerce Trust, the beneficiary was challenging the instrument itself (i.e. the will and resulting trust), and trying to have it set aside. There was no issue involving administration of the trust after it had become effective. Under those facts, this Court held that when a party challenges the testamentary instrument, and fails to have the instrument set aside, a no-contest clause in the instrument will be enforced regardless of the good faith or probable cause of the beneficiary in bringing the challenge.

In this case, Beneficiary has not challenged the Trust or sought in any way to set aside the Trust. To the contrary, Beneficiary is seeking to enforce the terms of the Trust. There is nothing in Commerce Trust which indicates a no-contest clause

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should be enforced against a beneficiary who is seeking to enforce the terms of a trust instrument, rather than challenging the instrument.

In Cox, this Court addressed a trust instrument which contained a no-contest clause reading as follows:

> [If] any beneficiary under this trust shall contest the validity thereof or attempt to vacate, alter or change any of the provisions thereof, such person shall thereby be deprived of all beneficial interest hereunder, and of any share, right or interest in the trust property, and the share of such person shall become a part of the residuary corpus of said trust, and such person shall be excluded from taking any part of such residuary corpus, and the same shall be divided equally among the other persons entitled to take such residuary corpus, under the provisions of Paragraphs 17 and 20 of said Deed in Trust.

Cox, 322 S.W.2d at 912. This Court considered whether certain beneficiaries had triggered the no-contest clause by joining an action that challenged the validity of the trust on the basis that the grantor was not competent. Id. at 912-13. This Court concluded the no-contest clause was enforceable regardless of whether the beneficiaries had acted in good faith or with probable cause in challenging the trust. Id. at 913-14. However, this Court held that the beneficiaries had not triggered the no-contest clause because they had not personally challenged the validity of the trust instrument. Id. at 914-16.

Once again, the facts of Cox are significantly different from the facts of the instant case. Unlike Cox, there is no issue of Beneficiary having challenged the Trust in this case. To the contrary, Beneficiary merely sought to enforce the terms

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of the Trust. This is a significant difference. The Cox decision did not address any issue regarding administration of the trust – it only addressed the application of a no-contest clause to a direct challenge to the trust instrument itself. And even on that question, this Court held the no-contest clause would only be applied if it were clear that the beneficiaries had challenged the trust instrument.

Rossi, Commerce Trust, and Cox do not apply in this case, because those cases addressed situations in which there was a challenge to the testamentary instrument, while there is no challenge to the Trust in this case. Indeed, the Appellate Court acknowledged this distinction in its Opinion, agreeing that these cases did not address the enforceability of a no-contest clause in an action that involved administration of a trust, rather than a challenge to the trust instrument. (App. A14). Nonetheless, the Appellate Court held that these decisions should be extended to apply to actions that only involve administration of the trust instrument. That holding is not well-founded.

There is a significant difference between a beneficiary challenging a trust and seeking to have it set aside, and a beneficiary addressing the administration of a trust by seeking to have the terms of the trust enforced. In the first instance, the beneficiary is directly challenging the trust instrument. In the latter situation, the beneficiary is seeking to enforce the trust instrument by addressing the trustee's administration of the trust. Recent decisions have recognized that very distinction

In Labantschnig v. Bohlmann, 439 S.W.3d 269 (Mo. App. 2014), a beneficiary brought an action against the trustee for breach of fiduciary duty, arguing the trustee had failed to properly carry out his duties under the trust. Id. 271-72. The trustee counterclaimed that the beneficiary had violated the trust's no-contest clause. Id. at 272. The trial court held the trustee had breached his fiduciary duties, and denied the counterclaim for breach of the no-contest clause. Id. at 272-73. On appeal, the Court affirmed the trial court's ruling, holding that the act of seeking to enforce the trust is "not a challenge to the Trust itself or its terms but an attempt to ensure that the Trust was executed according to its terms." Id. at 275. In that regard, the Court observed that a no-contest clause does not serve to "prohibit a beneficiary from questioning a Trustee's execution of the Trust," and that "enforcing one's rights under the Trust" does not trigger a no-contest clause because it does not challenge the trust. Id. The Court concluded that "actions to enforce the provisions of the Trust" do not trigger a no-contest clause. Id.

Other Courts have followed the analysis in Labantschnig. In Ughetta v. Cist, 2015 WL 3430094 (Del. Ch. 2015), the Court addressed a trustee's argument that a beneficiary's action, challenging the trustee's administration of the trust, had triggered a no-contest clause. Id. at *15. The beneficiary argued that her action did not trigger the no-contest clause because she was "challenging the administration of the trust in an effort to enforce the express language of the trust." Id. The Court

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agreed, citing Labantschnig for the proposition that "there is a distinction between a challenge to the propriety of a trustee's actions and an attack on the provisions of the trust itself." Id. at 16. The Court concluded that the beneficiary did not trigger the no-contest clause because she was "not seeking to alter or change any of the provisions of [the] trust," but was instead "attempting to enforce the provisions" of the trust. Id.

The same distinction applies in this case. Beneficiary is not seeking to challenge the Trust. Rather, Beneficiary is simply seeking to enforce the Trust by requiring Trustee to comply with the express terms of the Trust. Such an action does not constitute a challenge to a trust instrument, and does not trigger a no-contest clause. Accordingly, the decisions in Rossi, Commerce Trust and Cox – which only addressed challenges to a testamentary instrument – are not applicable under the facts of this case which involve trust administration.

C. A No-Contest Clause Which Seeks To Wholly Prevent The Beneficiary From Enforcing The Trust Is Contrary To Missouri Law And Public Policy.

In construing a trust, the intent of the settlor "must be gleaned, if possible, from the trust instrument as a whole." In re Gene Wild Ins. Trust, 340 S.W.3d 139, 143 (Mo. App. 2011); see also Kimberlin v. Dull, 218 S.W.3d 613, 616 (Mo. App. 2007); Blue Ridge Bank and Trust Co. v. McFall, 207 S.W.3d 149, 157 (Mo. App.

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2006). "In examining the entirety of the trust agreement at issue, no single word or clause is given undue preference." In re Gene Wild Ins. Trust, 340 S.W.3d at 143 (Mo. App. 2011); see also A.G. Edwards Trust Co. v. Miller, 59 S.W.3d 550, 552 (Mo. App. 2001).

In this case, the No-Contest Clause is merely one part of the Trust. Other Sections of the Trust illustrate an intent of the settlor to benefit Beneficiary by providing for monthly payments to Beneficiary under the Trust. Indeed, a reading of the entire Trust illustrates that these monthly payments are the **primary purpose** of the Trust. Beneficiary is the sole beneficiary of the Trust, and the provisions of the Trust plainly indicate that the whole point of the Trust is to provide for monthly payments to Beneficiary. Thus, the clear intent of the settlor, as exhibited by the language of the Trust, is to provide monthly payments to Beneficiary.

Given that the primary purpose of the Trust is to provide monthly payments to Beneficiary, it would be unreasonable to construe the Trust in a manner that denies Beneficiary the ability to take any action to protect that very right. That is, given that the settlor expressed an intent for Trustee to make monthly payments to Beneficiary, it would be unreasonable to construe the Trust as barring Beneficiary from taking any action when Trustee refuses to comply with this core obligation under the Trust.

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Missouri courts recognize that the only person who can seek to enforce a private trust is the beneficiary, or one acting on the beneficiary's behalf. In re Estate of Macormic, 244 S.W.3d 254, 258 (Mo. App. 2008); State ex rel. Nixon v. Hutcherson, 96 S.W.3d 81, 83 (Mo. banc 2003). Thus, the Trust cannot reasonably be construed as barring the only person able to enforce the terms of the Trust (i.e. Beneficiary) from seeking such enforcement.

Missouri trust law incorporates a "strong policy consideration of ensuring that someone has the power to enforce the trustee's fiduciary duties." In re Estate of Spencer, 417 S.W.3d 364, 369 (Mo. App. 2013); see also Peters v. Peters, 323 S.W.3d 49, 52 (Mo. App. 2010). If this Court were to hold that the No-Contest Clause prohibits any effort by Beneficiary to enforce Trustee's duties under the Trust, that ruling would be contrary to the strong public policy of ensuring that someone is able to enforce a trustee's fiduciary duties.

In short, the No-Contest Clause should not be applied to prevent Beneficiary from enforcing the core terms of the Trust. A no-contest clause which seeks to wholly prevent the beneficiary from enforcing the core requirements of the trust is contrary to the strong policy of ensuring that someone is able to enforce a trustee's duties.

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D. A No-Contest Clause Which Purports To Apply To Actions For Breach Of Trust And/Or Removal Is Actually An Exculpatory Clause, And Is Subject To The Limitations That Apply To Such Clauses.

Traditionally, no-contest clauses focused on challenges to the trust instrument, providing that if a beneficiary challenges the trust instrument then the beneficiary will forfeit all interest under the trust. However, in recent years, Missouri attorneys have started to greatly expand the scope of no-contest clauses by drafting no-contest clauses that purport to cover any type of action that a beneficiary may take with respect to a trust, including actions that solely involve administration of the trust. This use of a no-contest clause goes well beyond the traditional scope of such clauses. In fact, as explained below, extremely broad no-contest clauses of this type are more properly classified as exculpation clauses.

To the extent the No-Contest Clause at issue in this case might be viewed as applying to actions for breach of trust or removal, that would mean the No-Contest Clause is not truly a no-contest clause, but is instead an exculpatory clause. This distinction is important because exculpatory clauses are subject to specific limitations under Missouri law.

An exculpatory clause is generally defined as pertaining to an action involving a party's wrongful conduct, rather than an action which seeks to challenge an instrument For example, Black's defines "exculpatory clause" as follows:

> A contractual provision relieving a party from liability resulting from a negligent or wrongful act. • A will or a trust may contain an exculpatory clause purporting to immunize a fiduciary from a breach of duty; the clause may reduce the degree of care and prudence required of the fiduciary. But courts generally find that if an exculpatory clause in a will or trust seeks to confer absolute immunity, it is void as being against public policy.

BLACK'S LAW DICTIONARY 687-88 (10th ed. 2014). In contrast, Black's defines a "no contest clause" as "[a] provision designed to threaten one into action or inaction; esp., a testamentary provision that threatens to dispossess any beneficiary who challenges the terms of the will." BLACK'S LAW DICTIONARY 1209 (10th ed. 2014). Thus, a no-contest clause is a clause which seeks to bar a party from challenging an instrument, whereas an exculpatory clause is a clause which seeks to limit a party's ability to challenge the conduct of a trustee or other fiduciary.

The Restatement (Third) of Property makes the same distinction. The Restatement recognizes the validity of no-contest clauses, defining such clauses as "provision[s] 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 . . .." RESTATEMENT (THIRD) OF PROPERTY (WILLS & DON. TRANS.) § 8.5. However, the comments to this section draw a distinction between a true no-contest clause, and a no-contest clause which is actually an exculpatory clause in disguise: "A clause that purports to prohibit beneficiaries from enforcing fiduciary duties owed to the beneficiaries by trustees or

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other fiduciaries does not fall within the scope of this section. **Although sometimes couched as a no-contest clause, such a measure functions as an exculpation clause** and is governed by the standards applying to such clauses." Id. at § 8.5 cmt. a (emphasis added).

Although Missouri courts have not expressly addressed the distinction between a no-contest clause and an exculpatory clause, it is noteworthy that Missouri law regarding no-contest clauses is based upon cases that involve true no-contest clauses. For example, in Rossi, Commerce Trust, and Cox – the cases that the Circuit Court and Appellate Court relied upon – the no-contest clauses in issue addressed attempts to challenge or set aside the testamentary instrument. Rossi, 133 S.W.2d at 370 (Dealing with a no-contest clause that addressed actions "for the purpose of setting aside this instrument."); Commerce Trust, 318 S.W.2d at 292 (Dealing with a no-contest clause that addressed efforts to have a will "set aside or declared invalid."); Cox, 322 S.W.2d at 912 (Dealing with a no-contest clause that addressed attempts to "contest the validity" of the trust.).

While the language of no-contest clauses varies from case to case, the clauses addressed in cases such as Rossi, Commerce Trust, and Cox are similar in that they function as true no-contest clauses. That is, these clauses seek to bar challenges to the instrument itself (i.e. actions which seek to set aside or invalidate the trust). These clauses do not seek to bar actions pertaining to the trustee's administration of

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the trust once it becomes effective (i.e. actions which actually seek to enforce the terms of the trust).

The distinction between no-contest clauses and exculpatory clauses is more than a matter of academic interest. While no-contest clauses are not currently subject to any specific limitations under Missouri law, the same is not true of exculpatory clauses.

Although exculpatory clauses are enforceable in Missouri, they are strictly construed against the party seeking exculpation. Gates v. Sells Rest Home, Inc., 57 S.W.3d 391, 397 (Mo. App. 2001); Howe v. ALD Servs., Inc., 941 S.W.2d 645, 650 (Mo. App. 1997). Exculpatory clauses are viewed with disfavor. Guthrie v. Hidden Valley Golf & Ski, Inc., 407 S.W.3d 642, 647 (Mo. App. 2013); Easley v. Gray Wolf Investments, LLC, 340 S.W.3d 269, 272 (Mo. App. 2011). Furthermore, Missouri courts consistently have held that exculpatory clauses may never be used to "exonerate oneself from future liability for intentional torts or for gross negligence, or for activities involving the public interest." Alack v. Vic Tanny Int'l of Missouri, Inc., 923 S.W.2d 330, 337 (Mo. banc 1996); Caballero v. Stafford, 202 S.W.3d 683, 695 (Mo. App. 2006).

In addition to the general limitations that apply to exculpatory clauses under Missouri law, the MUTC provides specific limitations. Section 1008 of the MUTC – titled "Exculpation of trustee" – provides that "[a] term of a trust relieving a trustee

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of liability for breach of trust is unenforceable to the extent that it . . . relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries." R.S.Mo. § 456.10-1008.1(1). This provision is based upon Section 1008 of the Uniform Trust Code ("UTC"). The comments to that UTC Section state: "Even if the terms of the trust attempt to completely exculpate a trustee for the trustee's acts, the trustee must always comply with a certain minimum standard. As provided in subsection (a), a trustee must always act in good faith with regard to the purposes of the trust and the interests of the beneficiaries." UNIFORM TRUST CODE § 1008 cmt. (2010).

The Restatement (Third) of Trusts recognizes the same limitations on exculpatory clauses, stating as follows:

> Notwithstanding the breadth of language in a trust provision relieving a trustee from liability for breach of trust, for reasons of policy trust fiduciary law imposes limitations on the types and degree of misconduct for which the trustee can be excused from liability. Hence, an exculpatory clause cannot excuse a trustee for a breach of trust committed in bad faith. Nor can the trustee be excused for a breach committed with indifference to the interests of the beneficiaries or to the terms and purposes of the trust – that is, committed without reasonable effort to understand and conform to applicable fiduciary duties.

RESTATEMENT (THIRD) OF TRUSTS § 96 cmt. c. Other authorities have made similar observations: "As a matter of public policy, an exculpatory provision may not relieve a trustee of liability for a breach of fiduciary duty committed in bad faith or

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with reckless indifference to the purposes of the trust or the interests of the beneficiaries." Loring and Rounds: A Trustee's Handbook, p. 658 (2013).

Pursuant to these authorities, the No-Contest Clause should not be applied to "relieve[] the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries." R.S.Mo. § 456.10-1008.1(1). This conclusion is consistent with Section 105 of the MUTC, which provides that there are certain aspects of trust law that the settlor cannot vary or override by the terms of the trust, including:

> (2) the duty of a trustee to act in good faith and in accordance with the purposes of the trust;
>
> * * *
>
> (10) the effect of an exculpatory term under section 456.10-1008;

R.S.Mo. § 456.1-105.

Under Section 1008 of the MUTC, a trustee has an obligation to act in good faith and in accordance with the purposes of the trust, and an exculpatory clause should not be applied to remove that obligation or otherwise relieve the trustee of liability for acting in bad faith or with reckless indifference. Furthermore, under Section 105 of the MUTC, the settlor cannot vary that obligation of the trustee. Thus, to the extent the No-Contest Clause might be applied to protect Trustee from liability for failing to act in good faith, acting in bad faith or acting with reckless

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indifference, the No-Contest Clause is subject to the limitations under Missouri law that apply to exculpatory provisions. Accordingly, the No-Contest Clause would not be enforceable.

Trustee may argue that the limitations on exculpatory clauses are not applicable in this case because the clause at issue is a no-contest clause, not an exculpatory clause. But that argument is nothing more than an attempt to make an end run around the limitations on exculpatory clauses. A party cannot change an exculpatory clause into something else merely by changing the heading for that clause in the trust instrument. As explained above, clauses which seek to protect a trustee from its own liability are exculpatory clauses. Thus, the No-Contest Clause, which seeks to protect Trustee from liability, is an exculpatory clause and should be treated as such.

In light of the above authorities, it is apparent that even if the No-Contest Clause were applied to actions involving Trustee's administration of the Trust, the clause would be an exculpatory clause and would be subject to the same limitations that apply to all exculpatory clauses. Accordingly, the No-Contest Clause (which is really an exculpatory clause) cannot be enforced to protect Trustee from its own failure to act in good faith, or from its responsibility for acting in bad faith or acting with reckless indifference.

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E. Actions For Breach Of Trust And/Or Removal Do Not Constitute "Contests" For Purposes Of Missouri Law.

Obviously, in order for a no-contest clause to apply, there must first be a "contest." In the context of no-contest clauses, the term "contest" generally refers to an effort to challenge or otherwise undermine the instrument itself. Black's defines the term "no contest clause" as "[a] provision designed to threaten one into action or inaction; esp., a testamentary provision that threatens to dispossess any beneficiary who challenges the terms of the will." BLACK'S LAW DICTIONARY 1209 (10th ed. 2014). Other commentators define the term in a similar manner.[1]

In this case, Beneficiary is not seeking to **contest** the Trust because Beneficiary is not challenging the Trust in any way. To the contrary, the clear purpose of Beneficiary's Petition is to **enforce** the terms of the Trust and the duties of Trustee under the Trust. An action of this type does not constitute a "contest" of the trust instrument.

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[1] "A 'no-contest' or 'in terorrem' clause in a trust instrument provides for the forfeiture or reduction of the interest of a beneficiary who 'contests' the arrangement." Loring and Rounds: A Trustee's Handbook, p. 405 (2013); "An *in terrorem* clause is a provision inserted into a will in an attempt to prevent or deter a contest of the will." Ronald Z. Domsky, *In Terrorem* Clauses: More Bark Than Bite?, 25 Loy. U. Chi. L.J. 493, 494 (1994); "Although the word 'contest' is a term of art, in general, a will contest occurs when a party claims that the document purported to be the testator's last will is invalid on grounds which include the lack of testamentary capacity, fraud, undue influence, improper execution, forgery, or a subsequent revocation of the will by a later document." 3 A.L.R.5th 590 preamble (1992).

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Missouri courts have recognized on multiple occasions that actions that do not challenge the testamentary instrument itself do not constitute "contests" for purposes of a no-contest clause. For example, in Liggett v. Liggett, 108 S.W.2d 129 (Mo. 1937), this Court considered an attempt to invoke a no-contest clause following a prior action in which the Court had considered title to 80 acres of land that were at issue under the subject will. Id. at 129. In March of 1932, while his mother was still alive, the plaintiff had filed an action seeking to establish title to 80 acres that had been owned by the mother, by virtue of plaintiff having paid an encumbrance on the property. Id. at 129-30. In July of 1932, the mother executed a will that devised the 80 acres to plaintiff. Id. at 130. Following the mother's death, the executor sought to have plaintiff dismiss the previously filed lawsuit, and took the position that failure to dismiss the lawsuit would result in forfeiture of the devise of the 80 acres to plaintiff pursuant to the no-contest clause. Id. at 131.

On appeal, this Court recognized the validity of the no-contest clause, but held that plaintiff had not violated the clause by continuing to pursue the previously filed action pertaining to the 80 acres. Id. at 132. In that regard, this Court stated as follows: "Under the circumstances shown herein, we are of the opinion that plaintiff's failure to dismiss his suit did not amount to legally contesting the will so as to work a forfeiture of his devise." Id. at 134. In reaching that conclusion, this

Court placed great emphasis upon the fact that plaintiff's legal action only sought to obtain the very property that had been devised to him under the will. Id. at 133.

In Chaney v. Cooper, 954 S.W.2d 510 (Mo. App. 1997), Jess Gray predeceased his wife, Verda Gray. Id. at 513. Following the death of Verda Gray, certain beneficiaries objected to the probate of her will, seeking to dispute the distribution of certain real property under her will pursuant to the theory that they were entitled to an interest in the property by virtue of Jess Gray's will. Id. at 514. While the trial court initially found in favor of those beneficiaries, the appellate court subsequently determined that Jess Gray's will had granted Verda Gray a determinable fee simple estate in the subject property. Id. In a subsequent action for discovery of assets, the personal representative took the position that the beneficiaries were prohibited from taking under the will of Verda Gray by virtue of their prior action in objecting to the probate of Verda Gray's will. Id. The appellate court rejected that contention, finding that an objection to Jess Gray's will, and an action to discover assets, did not constitute a contest of Verda Gray's will. Id. at 519.

While the above cases address factual scenarios that differ from this action, these cases illustrate that Missouri courts will generally not apply a no-contest clause to an action which does not actually seek to contest the instrument in question. This is particularly true when the action simply seeks to enforce the terms of the

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instrument. This same principle has been recognized more directly by Courts in other jurisdictions. For example, in Barr v. Dawson, 158 P.3d 1073 (Okla. App. 2006), the Court recognized that "actions seeking construction of a will, resolving administrative concerns, challenging an executor's suitability for appointment, and filing creditor's claims have been held not to be contests." Id. at 1075. In In re Penoyer Trust, 2006 WL 2380881 (Mich. App. 2006), the Court held that an action to remove the trustee did not violate a no-contest clause because it did not challenge the provisions of the trust or the distributions to be made pursuant to those provisions. Id. at *1. In Commonwealth Bank & Trust Co. v. Young, 361 S.W.3d 344 (Ky. App. 2012), the Court held that an action alleging wrongful conduct of the trustee in the administration of the trust did not violate a no-contest clause because it did not seek to invalidate the trust document. Id. at 352. Other courts have reached similar conclusions. See, e.g., Doelle v. Bradley, 784 P.2d 1176, 1179 (Utah 1989) (Holding that a "claim [that] does not directly attack a will . . . is not a will contest" for purposes of applying a no-contest clause.); Jackson v. Braden, 717 S.W.2d 206, 208 (Ark. 1986) (Holding that a claim which alleged the executor failed to comply with the probate code in administering the will, but which did not challenge the will itself, did not trigger the no-contest clause in the will.).

Commentators likewise have recognized that actions pertaining to the administration of a trust do not fall within the scope of a no-contest clause:

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> Where a beneficiary brought or joined an action calling the trustee's administration or management of the trust into question, the courts typically have held that no forfeiture resulted because the beneficiary was not seeking to set aside the trust or to have any of its provisions declared invalid, but was instead seeking a court determination of whether the trust was being administered for the purpose and in the manner intended by the settlor. Thus **suits to remove the trustee on the grounds of mismanagement or to enforce disposition of trust income or assets in accordance with the terms of the instrument have been held not to be a contest requiring forfeiture**.

Bogert, THE LAW OF TRUSTS AND TRUSTEES § 181 (2013) (emphasis added); see also 90 C.J.S. Trusts § 269 (2012) ("An action does not violate a no contest clause if the plaintiff does not assert any interest in the trust other than that provided by its express terms and does not contest, dispute, or call into question the trust agreement's validity.").

In light of the above referenced authorities, Beneficiary's action should not be considered a "contest" because Beneficiary's action does not seek to invalidate the Trust, but instead seeks to enforce the Trust. As previously noted, Beneficiary is not seeking to undermine the intent of the settlor. Rather, Beneficiary is seeking to enforce the settlor's intent by enforcing the terms of the Trust and the obligations of Trustee under the Trust. This underlying question of whether the action is consistent with the settlor's intent appears to be a significant factor.

In Liggett, this Court placed great emphasis upon the fact that plaintiff's legal action only sought to obtain the very property that had been devised to him under the will. Liggett, 108 S.W.2d at 133. Courts in other jurisdictions have made similar

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observations. <u>See, e.g.</u>, <u>In re Estate of Schiwetz</u>, 102 S.W.3d 355, 365 (Tex. App. 2003) (Noting that an action seeking "to ascertain the intention of the testator" does not constitute a contest.). As one commentator has observed: "The beneficiary's reason for bringing an action is relevant in determining whether a violation of the forfeiture clause occurred; actions brought to determine and further the settlor's intent generally do not constitute a forfeiture." Bogert, THE LAW OF TRUSTS AND TRUSTEES § 181.

Because the purpose of Beneficiary's action is to enforce the terms of the Trust, rather than seeking to challenge the Trust, Beneficiary's action should not be viewed as a "contest." Accordingly, Beneficiary's action should not be subject to the No-Contest Clause.

F. A No-Contest Clause Which Seeks To Eliminate The Fiduciary Duties Of The Trustee Is Not Enforceable.

Even if the No-Contest Clause applies to the administration of the Trust, that does not mean the settlor has an unbounded ability to limit the liability of Trustee. There are certain core obligations of trustees and other fiduciaries that cannot be eliminated under Missouri law. There are also certain powers of oversight vested in the Court that cannot be removed at the whim of the settlor. Furthermore, there are well-recognized limits to the power of the settlor to establish trust provisions that violate law or public policy.

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1. Missouri courts have the authority and obligation to assess the enforceability of trust provisions.

Missouri courts have held consistently that "[a] court of equity has the inherent power to exercise jurisdiction over trust estates, to supervise their administration, and to make all orders necessary for their preservation and conservation." Betty G. Weldon Revocable Trust ex rel. Vivion v. Weldon ex rel. Weldon, 231 S.W.3d 158, 173 (Mo. App. 2007) (internal punctuation omitted); see also Williams v. Duncan ex rel. Pauline M. Babcock, Living Trust, 55 S.W.3d 896, 901 (Mo. App. 2001); Kimpton v. Spellman, 173 S.W.2d 886, 891 (Mo. 1943). The MUTC also acknowledges the authority of the courts to oversee administration of trusts. R.S.Mo. § 456.2-201. Thus, regardless of the language of the trust instrument, a settlor cannot wholly remove the Court's ability to oversee trust administration.

Missouri courts also have held consistently that a term of a trust is not enforceable if it would violate some rule of law or public policy. Bruce G. Robert QTIP Marital Trust v. Grasso, 332 S.W.3d 248, 254 (Mo. App. 2010); Blue Ridge Bank and Trust Co., 207 S.W.3d at 160; Boone County Nat. Bank v. Edson, 760 S.W.2d 108, 111 (Mo. banc 1988). As the Court in Bruce G. Robert QTIP Marital Trust observed, it is not enough to simply determine the intent of the settlor – the Court must also assess whether that intent is illegal or violates public policy. Bruce G. Robert QTIP Marital Trust, 332 S.W.3d at 256 ("Having found a clearly defined

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intention of the testator set forth in [the] Trust, we must further analyze whether this intention, 'if carried out, will violate some positive rule of law, or subvert some rule of public policy.'").

The MUTC is consistent with Missouri cases in recognizing that the terms of a trust are only enforceable to the extent that those terms do not violate Missouri law or public policy. In that regard, the MUTC provides: "A trust may be created only to the extent its purposes are lawful, not contrary to public policy, and possible to achieve." R.S.Mo. § 456.4-404.

Pursuant to these authorities, it is not sufficient for this Court to simply determine the intent of the settlor as expressed in the No-Contest Clause. This Court must also consider whether that intent violates Missouri law or public policy. If this Court finds that the express terms of the No-Contest Clause violate Missouri law or public policy, then this Court should decline to enforce the No-Contest Clause.

2. Missouri law imposes certain mandatory duties upon trustees and fiduciaries.

Missouri courts have recognized consistently that there are certain standards that are inherent in the position of trustee. "'A trustee is a fiduciary of the highest order and is required to exercise a high standard of conduct and loyalty in administration of the trust.'" Saigh v. Saigh, 218 S.W.3d 556, 561 (Mo. App. 2007); see also Ramsey v. Boatmen's First Nat. Bank of Kansas City, N.A., 914 S.W.2d

384, 387 (Mo. App. 1996). "[A] fiduciary must act scrupulously and honestly in carrying out his duties." Eastern Atlantic Transp. and Mechanical Engineering, Inc. v. Dingman, 727 S.W.2d 418, 423 (Mo. App. 1987). "As part of its duty of loyalty, the trustee is to administer the trust solely in the interest of the beneficiary." Saigh, 218 S.W.3d at 561.

The MUTC has largely incorporated the standards set forth in the above-noted cases, as well as adopting additional standards that apply to trustees and that dictate the authority of the Court to oversee administration of a trust. The MUTC provides that "[a] trustee shall administer the trust solely in the interests of the beneficiaries." R.S.Mo. § 456.8-802.1. The MUTC further provides that "the trustee shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries." R.S.Mo. § 456.8-801.

The MUTC also spells out specific remedies for breach of trust that are within a Court's power, including the following:

- The right to "compel the trustee to redress a breach of trust by paying money, restoring property, or other means,"
- The right to "order a trustee to account,"
- The right to "appoint a special fiduciary to take possession of the trust property and administer the trust,"
- The right to "remove the trustee,"
- The right to "reduce or deny compensation to the trustee,"

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- The right to "void an act of the trustee,"

- The right to "trace trust property wrongfully disposed of and recover the property or its proceeds," and

- The right to "order any other appropriate relief."

R.S.Mo. § 456.10-1001.2.

The above-referenced provisions impose specific duties upon a trustee, and grant the Court specific authority to oversee the administration of a trust. But the MUTC does not simply establish the duties of trustees and the authority of the Court – **it imposes limitations upon the ability of the settlor to vary those duties and powers**. Specifically, **the MUTC provides that there are certain aspects of trust law that the settlor cannot vary or override by the terms of the trust**, including the following:

> (1) the requirements for creating a trust;
>
> (2) the duty of a trustee to act in good faith and in accordance with the purposes of the trust;
>
> (3) the requirement that a trust and its terms be for the benefit of its beneficiaries;
>
> * * *
>
> (10) the effect of an exculpatory term under section 456.10-1008; [and]
>
> * * *

(13) the power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice.

R.S.Mo. § 456.1-105.

More generally, the MUTC recognizes that there are certain core obligations of a trust that are inherent in the nature of a trust. For example, the MUTC provides that "a trust is created only if . . . the trustee has duties to perform." R.S.Mo. § 456.4-402. Thus, if there is a trust, then the trustee must have some enforceable duties. The MUTC also provides that "[a] trust and its terms must be for the benefit of its beneficiaries." R.S.Mo. § 456.4-404. Accordingly, the trustee cannot be completely unaccountable to the beneficiaries.

As previously noted, the MUTC is based largely upon the UTC. The comments to the pertinent UTC provisions further support the view that a settlor may not wholly remove the accountability of the trustee or the power of the Court to oversee administration of the trust. For example, the comments to Section 105 of the UTC – the counterpart to R.S.Mo. § 456.1-105 – indicate that the limit on the ability of a settlor to vary the trustee's duties "confirms that the requirements for a trust's creation, such as the necessary level of capacity and the requirement that a trust have a legal purpose, are controlled by statute and common law, not by the settlor." UNIFORM TRUST CODE § 105 cmt. (2010). The comments also provide that "a settlor may not so negate the responsibilities of a trustee that the trustee would no longer be acting in a fiduciary capacity." UNIFORM TRUST CODE § 105 cmt. (2010).

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Similarly, the introductory comments to Article 10 of the UTC – the section that contains the counterpart to R.S.Mo. § 456.10-1001 – indicate that "[t]he settlor may not . . . interfere with the court's ability to take such action to remedy a breach of trust as may be necessary in the interests of justice." UNIFORM TRUST CODE art. 10 cmt. (2010).

3. A no-contest clause may not wholly relieve a trustee of all accountability, or bar the court from oversight of trust administration.

As noted in the preceding section, "a trust is created only if . . . the trustee has duties to perform." R.S.Mo. § 456.4-402. Indeed, many authorities define a trust as an instrument which creates a fiduciary relationship. For example, the Restatement (Second) of Trusts defines a trust in pertinent part as follows:

> **[A] fiduciary relationship** with respect to property, arising from a manifestation of intention to create that relationship and **subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons**, at least one of whom is not the sole trustee.

RESTATEMENT (SECOND) OF TRUSTS § 2 (emphasis added). Similarly, the Missouri Practice Series defines a trust as follows:

> **A trust**, which arises as a result of a manifestation of an intent to create a trust, **is a fiduciary relationship** with respect to property **subjecting the legal title holder to equitable duties to deal with it for the benefit of another person**.

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Francis M. Hanna, Missouri Practice Series, Trust Code and Law Manual, Part II, Chapter 1, Section 1:2 (emphasis added). As these definitions emphasize, a trust necessarily entails duties that the trustee is bound to comply with, including the core duty of acting for the benefit of the beneficiary. As the Missouri Practice Series notes: "To create a private express trust, **the settlor must manifest an intent to impose the requisite fiduciary duties upon himself or another with respect to identifiable property**, the trust res." Id. (emphasis added).

Because a valid trust necessarily entails fiduciary duties, a trust cannot reasonably be construed as removing all accountability from the trustee. "It is elementary trust law that a trustee must have duties to perform. Without enforceable duties, the beneficiary has no enforceable interest, which makes the trust illusory." Louise Lark Hill, Fiduciary Duties and Exculpatory Clauses: Clash of The Titans or Cozy Bedfellows?, 45 U. MICH. J.L. REFORM 829, 832 (2012). Similarly, "[a] trust whose terms authorize bad faith performance, like a trust that denies enforceable duties, would be illusory." John H. Langbein, Mandatory Rules in the Law of Trusts, 98 NW. U. L. REV. 1105, 1124 (2004). Thus, a trust must be construed as imposing certain necessary duties upon the trustee, and as allowing the Court to exercise oversight of the administration of the trust.

In light of the fact that enforceable fiduciary duties are a necessary component of a trust, many authorities recognize that a trust provision which attempts to remove

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all accountability from the trustee, or which attempts to eliminate the Court's ability to oversee administration, is simply unenforceable. For example, the Restatement (Third) of Trusts provides that "any provision that seeks to bar claims against the trustee for breach of trust" is not enforceable "to the extent that it purports to relieve the trustee . . . of liability for a breach of trust committed in bad faith or with indifference to the fiduciary duties of the trustee, the terms or purposes of the trust, or the interests of the beneficiaries." RESTATEMENT (THIRD) OF TRUSTS § 96. This Section further provides that "**[a] no-contest clause shall not be enforced to the extent that doing so would interfere with the enforcement or proper administration of the trust.**" Id. (emphasis added).

The comments to Section 96 explain that "**an otherwise enforceable no-contest clause is unenforceable insofar as doing so would inhibit beneficiaries' enforcement of their rights under a trust (whether created by the will or other instrument) or would otherwise undermine the effective, proper administration of the trust.**" Id. at § 96 cmt. e (emphasis added). The comments further explain:

> **[A] no-contest clause ordinarily is unenforceable to prevent or punish**: a beneficiary's petition for instructions; a demand for or challenge to a trustee's accounting; **a suit to enjoin or redress a breach of trust; a petition for removal of a trustee for unfitness or for repeated or serious breach of trust**; a suit alleging that a trustee's particular exercise of discretion or even "absolute" discretion constituted an abuse of discretion; or the like.

Id. (internal cross-references omitted) (emphasis added).

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Section 29 of the Restatement (Third) of Trusts addresses this issue more generally in terms of trust provisions that violate public policy. Id. at § 29. Comment m to that Section recognizes the limits of no-contest provisions (and similar provisions), stating as follows:

> **[A] trust provision may not be enforced if to do so would undermine proper administration of the trust.** Thus, **a provision that purports to prevent a court from removing a trustee will be disregarded if removal appears appropriate to proper administration of the trust** . . .. A provision is also invalid to the extent it purports to relieve the trustee altogether from accountability and the duty to provide information to beneficiaries, or to relieve the trustee from liability even for dishonest or reckless acts.

Id. at § 29 cmt. m (internal cross-references omitted) (emphasis added).

Professor John H. Langbein has written extensively on the issue of mandatory and default rules of trust – the same dichotomy that applies under the MUTC (R.S.Mo. § 456.1-105) and the UTC (UNIFORM TRUST CODE § 105 (2010)). In that regard, Professor Langbein has described the mandatory rules of trusts as follows:

> [Mandatory rules] are rules that channel and facilitate, rather than defeat, the settlor's purpose. Included are the rule that prevents the settlor from dispensing with fiduciary obligations; the rule that prevents the settlor from dispensing with good faith in trust administration; the rule that limits the permitted scope of exculpation clauses; and the rule that requires that the existence and terms of the trust be disclosed to the beneficiary. **Such terms, were they allowed, would authorize the trustee to loot the trust.**

John H. Langbein, Mandatory Rules in the Law of Trusts, 98 NW. U. L. REV. 1105, 1106 (2004) (emphasis added).

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Professor Langbein also has noted that, even with respect to default rules of trust (i.e. rules which may be varied by the settlor), there are still limits. In that regard, Professor Langbein has observed as follows:

> [E]ven though most rules of trust law (such as the duties to diversify and to invest prudently) are default rules rather than mandatory rules, it does not follow that the settlor is free to authorize any conceivable departure from the default rules. **A default rule is one that the settlor can abridge, but only to the extent that the settlor's term is 'for the benefit of [the] beneficiaries.' The requirement that there be benefit to the beneficiaries sets outer limits on the settlor's power to abridge the default law.** Trust law's deference to the settlor's direction always presupposes that the direction is beneficiary-regarding.

Id. at 1112 (2004) (emphasis added).

Other commentators speak in terms of fiduciary duties that cannot be waived by the settlor. For example, a trustee's "duty to act in good faith and in accordance with the purposes of the trust may not be waived by the settlor." Loring and Rounds: A Trustee's Handbook, p. 419 (2013). "The fundamental requirement that a trust and its terms be for the benefit of the beneficiaries also is not waivable, nor as a matter of public policy is the trustee's duty to account." Id. In this respect, the commentators have observed that the trustee's core duties are similar to the core duties that inhere in all contracts, but much more stringent:

> The parties to a mere contract owe each other nonwaivable legal duties of good faith and fair dealing. A trustee of a trust, on the other hand, owes the beneficiaries not only a nonwaivable equitable duty of good faith but also a nonwaivable equitable duty of undivided loyalty.

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Id. at p. 420.

The above-noted authorities consistently recognize that a trust provision that attempts to remove the trustee's accountability to the beneficiaries, or that attempts to eliminate the Court's oversight of administration, is unenforceable. These authorities are consistent with Missouri case law and the MUTC. However, Missouri courts have not yet addressed these issues in detail. Thus, it is useful to look at decisions from other jurisdictions which have addressed these issues.

In Fazzi v. Klein, 119 Cal.Rptr.3d 224 (Cal. App. 2010), the Court held that a no-contest clause which seeks to prohibit an action to remove a trustee is unenforceable. Id. at 231. As the Court observed, "no contest clauses that purport to insulate executors completely from vigilant beneficiaries violate public policy." Id. at 232 (internal punctuation omitted). Based on that analysis, the Court held that "the trial court here correctly asserted **a trustee cannot 'hide behind a no contest clause' and commit breaches of fiduciary duty with impunity**." Id. (emphasis added).

In In re Estate of Thomas, 28 So.3d 627 (Miss. App. 2009), the Court recognized that a no-contest clause cannot be applied to an action pertaining to the administration of a trust because "'[t]o hold otherwise, would mean that an Executor and/or a Trustee is free to spend a decedent's money without accountability to anyone.'" Id. at 638.

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In Sinclair v. Sinclair, 670 S.E.2d 59 (Ga. 2008), the Court held that a no-contest clause could not be applied to an action seeking an accounting and seeking to remove the executor. Id. at 61. In so holding, the Court quoted at length from an earlier case which recognized that application of a no-contest clause under such circumstances would violate public policy:

> The question is whether or not this condition is void as being contrary to public policy, where the purpose of such litigation is to enforce the will and to compel the executor or his successor to carry out its terms. In this connection, it seems manifest that such a provision, if applied to prevent such an action as here contemplated, would be contrary to public policy and for that reason invalid. **After a will has been admitted to probate, certain duties and obligations are thereupon imposed by law on the named executor. He has no arbitrary powers to avoid the provisions of a will which he is appointed to execute, and the provision here being considered cannot be construed to confer any such unbridled authority. The executor, therefore, remains amenable to law in all his acts and doings as such, and a beneficiary under the will, in seeking to compel the performance of his duty, will not be penalized for so doing.**

Id. (quoting Cohen v. Reisman, 48 S.E.2d 113 (Ga. 1948)) (internal punctuation omitted) (emphasis added). As the Court observed: "[A] condition *in terrorem* cannot make an executor unanswerable for any violations of the will or of the laws governing personal representatives in Georgia. 'A beneficiary assuredly is empowered to enforce the provisions of a [will], no matter the terms of any *in terrorem* clause.'" Id.

Texas courts have held that an action alleging a violation of fiduciary duties by a trustee cannot constitute a violation of a no-contest clause because "'[t]he right

to challenge a fiduciary's actions is inherent in the fiduciary/beneficiary relationship.'" Lesikar v. Moon, 237 S.W.3d 361, 369-71 (Tex. App. 2007).

In Wojtalewicz's Estate v. Woitel, 418 N.E.2d 418 (Ill. App. 1981), the plaintiff sought to challenge the appointment of the executor named under the will on the basis that the executor had failed to timely file tax returns, thereby causing the estate to incur substantial penalties. Id. at 419. In finding that the no-contest clause of the will could not be applied to such an action, the Court stated as follows: **"[I]t would violate public policy to give effect to the *in terrorem* clause since its enforcement would endanger the assets of the estate.** Courts closely scrutinize an executor's behavior to insure that the standards of fair dealings and diligence of an executor toward the estate are adhered to." Id. at 420 (emphasis added).

These cases illustrate the importance of considering the core duties of the trustee, and the core powers of the Court, when considering the application of a no-contest clause. While it is valid to use a no-contest clause to discourage challenges to the instrument itself, such a clause cannot be used to remove the trustee's accountability or to eliminate the Court's right to oversee administration of the trust. As Professor Langbein observed, "[s]uch terms, were they allowed, would authorize the trustee to loot the trust." John H. Langbein, Mandatory Rules in the Law of Trusts, 98 NW. U. L. REV. 1105, 1106 (2004) (emphasis added).

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4. The No-Contest Clause should not be applied to Beneficiary's action, which seeks to enforce Trustee's core duties under the trust.

In light of the above authorities, it is clear the No-Contest Clause should not be applied to Beneficiary's action, which merely seeks to enforce Trustee's core duties under the Trust. Any such application would be contrary to Missouri case law which provides that certain duties of the trustee cannot be varied, and that the power of the Court to oversee administration cannot be limited. Such an application also would be contrary to the MUTC, which provides that certain duties of the trustee and powers of the Court are not subject to alteration by the settlor. As previously noted, Missouri courts have held consistently that a term of a trust is not enforceable if it would violate some rule of law or public policy. Bruce G. Robert QTIP Marital Trust, 332 S.W.3d at 254.

Any application of the No-Contest Clause that allowed Trustee to act in bad faith, and with no accountability to Beneficiary or the Court, would be contrary to the most basic concepts of trust law. As Professor Langbein has observed, a trust should be construed with the assumption that the settlor intended to benefit the beneficiaries:

> The mandatory rule against bad faith trusteeship can be understood to operate as a presumption that trust terms authorizing bad faith must have been improperly concealed from the settlor or otherwise misunderstood by the settlor when propounded, because **no settlor seeking to benefit the beneficiary would expose the beneficiary to the hazards of bad faith trusteeship**.

John H. Langbein, Mandatory Rules in the Law of Trusts, 98 NW. U. L. REV. 1105, 1124 (2004) (emphasis added). Regardless of the language of the Trust, this Court should not assume the settlor intended to allow the Trustee to engage in misconduct with no accountability under any circumstances.

G. To The Extent Missouri Common Law Regarding No-Contest Clauses Might Be Viewed As Applying To Actions For Breach Of Trust And/Or Removal, This Court Should Recognize An Exception For Actions Involving Trust Administration.

As explained in the previous sections, a no-contest clause does not apply to actions that involve administration of a trust (i.e. actions for breach of trust or removal). No-contest clauses were never intended to apply to such actions, and Missouri courts have not applied no-contest clauses in that context. However, if this Court finds that Missouri law might be viewed as allowing a no-contest clause to be applied to an action which solely involves administration of a trust (i.e. not a challenge to the trust instrument), then Beneficiary requests that this Court recognize an exception to the enforcement of no-contest clauses which applies in cases involving administration of a trust. Recognition of such an exception is consistent with existing Missouri law.

As previously noted, Missouri courts have held that actions which do not seek to challenge the instrument itself are not "contests" for purposes of a no-contest

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clause. See, e.g., Chaney, 954 S.W.2d at 519; Liggett, 108 S.W.2d at 132. More specifically, in Hillyard v. Leonard, 391 S.W.2d 211 (Mo. 1965), this Court recognized that an action to enforce the administration of a trust should not be viewed as violating a no-contest clause:

> A principal purpose of the grantor was to see after the well-being of his wife, and, of course, his children and grandchildren during the duration of the trust. **The 'no contest' forfeiture provision could only have been inserted to protect those purposes while they existed. The grantor could not have meant that any beneficiary would lose his interest if he brought suit to force the trustees to make distribution when he was entitled to it, and when the purpose of the trust would not be thwarted**.

Id. at 226 (emphasis added).

Commentators have recognized that when no-contest clauses are construed too broadly, they tend to "chill or prevent even legitimate challenges to such things as gross trustee misconduct or abuses of power." Robert J. Will, Current Legislation: *In Terrorem* Clauses and the Fiduciary Exception, p. 27, 8th Annual Fiduciary Litigation Seminar, Bar Association of Metropolitan St. Louis (February 20, 2013). Construing a no-contest clause as applying to actions involving administration, which simply seek to enforce the terms of the trust, would have precisely this chilling effect, and would serve to prevent Courts from addressing trustee misconduct and abuses of power.

In light of these authorities – particularly the comments in Hillyard – this Court should recognize an exception to no-contest clauses for actions which pertain to the administration of a trust.

When a no-contest clause is applied to a challenge to a trust instrument, this presents the beneficiary with a win or lose proposition. If the beneficiary succeeds in setting aside the trust, then the no-contest clause is no longer in place, and the beneficiary does not lose anything pursuant to the no-contest clause. However, if the beneficiary fails in his effort to set aside the trust, then the no-contest clause is still in place and applies to result in a forfeiture by the beneficiary.

This Court has previously recognized this very distinction. In Rossi, when this Court discussed the enforcement of no-contest clauses, this Court emphasized the fact that if the beneficiary prevails, then it will suffer no negative consequences from the no-contest clause. In that regard, this Court observed:

> If there be a will the legatee or devisee takes thereunder what the will gives him and subject to the conditions thereby imposed. He may contest the will and show, if he can, that it is not the will of his ancestor, whereupon the whole purported will falls. . . . He is not precluded by the no-contest clause from seeking redress in the courts. The courts are open to him to show, if he can, that the alleged will or instrument is not the will of his ancestor-is not valid-in which case the whole instrument falls. . . . The dissatisfied legatee or beneficiary has his day in court. He may, without legal restraint, submit to the court the question, is the purported instrument in fact the will of the maker? If it be adjudged that it is not, he wins. If it be adjudged that it is, he loses. But every litigant takes and must take the chance to win or lose in a law suit.

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Rossi, 133 S.W.2d at 380-81. Thus, this Court recognized that no-contest clauses are enforceable in cases involving a challenge to the trust instrument, because the beneficiary has an opportunity to prevail. The beneficiary can challenge the instrument, and if the beneficiary prevails, then the beneficiary suffers no negative consequences from the no-contest clause. But if the beneficiary loses, then the instrument remains in place, including the no-contest clause, and the beneficiary is subject to the no-contest clause.

Commentators have likewise recognized that this all-or-nothing rationale is the basis for enforcing no-contest clauses. Gerry W. Beyer, Rob G. Dickinson and Kenneth L. Wake, The Fine Art of Intimidating Disgruntled Beneficiaries With *In Terrorem* Clauses, 51 SMU L. Rev. 225, 227 (1998); see also Kara Blanco and Rebecca E. Whitacre, The Carrot and Stick Approach: *In Terrorem* Clauses in Texas Jurisprudence, 43 TEX. TECH L. REV. 1127, 1129 (2011); Martin D. Begleiter, Anti-Contest Clauses: When You Care Enough to Send the Final Threat, 26 ARIZ. ST. L.J. 629, 643 (1994).

While this all-or-nothing rationale makes sense when addressing an action that challenges the instrument itself, this rationale does not make sense when addressing an action that involves trust administration. If a beneficiary brings an action regarding a trustee's administration of a trust, and the Court issues a judgment finding that the trustee has engaged in misconduct, the trust is still in place following

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that judgment, including any no-contest clause that is contained in the trust. Thus, unlike the case when the instrument itself is challenged, the action pertaining to administration does not necessarily render a no-contest clause in the instrument a nullity. This leads to the anomalous result that the beneficiary would forfeit his interest under the trust, pursuant to the still effective no-contest clause, even though he prevailed on his breach of trust action.

This distinction between actions that challenge the instrument and actions that do not challenge the instrument is crucial to the analysis. In the case of a challenge to the instrument, the beneficiary is faced with an all-or-nothing proposition. If he wins, then the instrument is set aside and he does not forfeit. But if he loses, then he forfeits. In contrast, if a no-contest clause is treated as applying to actions that do not challenge the instrument (i.e. actions involving administration), then the beneficiary would lose no matter what happens. Even if the Court finds that the trustee has engaged in egregious misconduct, the no-contest clause would still be in place and would still cause a forfeiture. In other words, the beneficiary loses even if he wins.

The ability of the beneficiary to prevail in an action challenging a trust (i.e. the traditional purpose of a no-contest clause) acts as a sort of safety valve. If the beneficiary prevails in his action, then the no-contest clause will be rendered moot. However, if no-contest clauses are treated as applying to actions involving

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administration of a trust, there is no similar safety valve. Because the no-contest clause will still be in place following an action which does not challenge the instrument, the beneficiary could forfeit even if he is addressing conduct that is blatantly and undeniably wrongful. In other words, absent an exception for cases involving administration of a trust, the no-contest clause would provide a license for the trustee to engage in any and all manner of misconduct with absolutely no consequences.

No-contest clauses were never meant to insulate the trustee from all potential liability for its own misconduct. Thus, it is necessary to recognize an express exception to the enforcement of no-contest clauses in cases that involve administration of the trust (as opposed to cases which involve a challenge to the trust instrument). Accordingly, Beneficiary asks this Court to recognize and apply such an exception in this case.

H. This Court Should Reexamine Its Prior Holdings In Rossi, Commerce Trust, And Cox, And Hold That No-Contest Clauses Are Subject To An Exception For Good Faith/Probable Cause.

As previously noted, this Court has held that in cases involving challenges to a testamentary instrument, no-contest clauses are not subject to any exception for good faith or probable cause. The cases which reached this conclusion are sixty years old or older. In the six decades since this Court last addressed this issue, the

national approach to no-contest clauses has changed drastically, and Missouri now follows an extreme minority position that is roundly rejected by commentators. Beneficiary contends that, given the intervening changes in the law, it is appropriate for this Court to reexamine its prior rulings in Rossi, Cox, and Commerce Trust, and to join the large majority jurisdictions that recognize a good faith/probable cause exception to the enforcement of no-contest clauses.

1. This Court's prior analysis of the good faith/probable cause exception.

In order to properly assess the significant changes in law that have occurred since this Court last addressed the issue of a good faith/probable cause exception, it is useful to consider the progression of this Court's prior cases addressing that issue.

In In re Chambers' Estate, 18 S.W.2d 30 (Mo. banc 1929), a beneficiary of a will contested the will. Id. at 30. The trial court held that, as a result of the will contest, the beneficiary had forfeited his interest under the will by virtue of the will's no-contest clause. Id. On appeal, the beneficiary argued that the no contest clause should not be enforced because his action had been brought in good faith and with probable cause. Id. at 30-31. This Court noted that the issue of whether no-contest clauses are subject to a good faith/probable cause exception was an issue of first impression in Missouri. Id. at 31. However, this Court noted that numerous other

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jurisdictions had previously addressed this question, and recognized that there was a split of authority by which such an exception could be accepted or rejected:

> A reading of the decisions and the reasons advanced suggests the thought that a judicial opinion can be constructed on either side of the controversy, well supported by authority, and apparently supported by reason.

Id. In concluding that the no-contest clause at issue was to be enforced regardless of any question of good faith or probable cause, this Court focused on the following decisions from other states which had rejected a good faith/probable cause exception:

> Donegan v. Wade, 70 Ala. 501, 1881 WL 1297 (Ala. 1881)
>
> Bradford v. Bradford, 19 Ohio St. 546, 1869 WL 90 (Ohio 1869)
>
> Hoit v. Hoit, 7 A. 856 (N.J. App. 1886)
>
> In Re Miller's Estate, 103 P. 842 (Cal. 1909)
>
> Moran v. Moran, 123 N.W. 202 (Iowa 1909)

Id. at 34.

In Rossi v. Davis, 133 S.W.2d 363 (Mo. 1939), this Court again considered the issue of a good faith/probable cause exception to a no-contest clause, stating:

> [T]here seems to be considerable difference of judicial opinion as to whether or not an exception should be allowed to the rule, or, perhaps more accurately speaking, in applying the rule and enforcing the forfeiture, where there appears to have been probable cause for the contest. Some courts, **we believe the majority** which have definitely decided the exact point where it was an issue, have refused to allow an exception on the ground of probable cause where the testator had made

> none; others have taken the view that an exception should be allowed and the forfeiture denied where it appeared the contest, though unsuccessful, had been made in good faith and on probable cause.

Id. at 373 (emphasis added). This Court noted it had previously considered this issue in In re Chambers' Estate, 18 S.W.2d 30 (Mo. banc 1929), and that it would consider the authorities from other jurisdictions cited in Chambers, as well as others. Id. at 374. This Court then noted the following decisions from other jurisdictions which had rejected a good faith/probable cause exception:

Rudd v. Searles, 160 N.E. 882 (Mass. 1928)

Schiffer v. Brenton, 226 N.W. 253 (Mi. 1929)

Moran v. Moran, 123 N.W. 202 (Iowa 1909)

In re Estate of Miller, 103 P. 842 (Cal. 1909)

Bradford v. Bradford, 19 Ohio St. 546, 1869 WL 90 (Ohio 1869)

Bender v. Bateman, 168 N.E. 574 (Ohio App. 1929)

In re Kitchen, 220 P. 301 (Cal. 1923)

Donegan v. Wade, 70 Ala. 501, 1881 WL 1297 (Ala. 1881)

Hoit v. Hoit, 7 A. 856 (N.J. App. 1886)

Id. at 376, 378-79. Relying on these cases, and the cases previously cited in In re Chambers, this Court declined to adopt a good faith/probable cause exception. Id. at 380.

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In Commerce Tr. Co. v. Weed, 318 S.W.2d 289 (Mo. 1958), the beneficiary asked this Court to reconsider its decisions in Chambers and Rossi, and to recognize a good faith/probable cause exception. Id. at 299-300. In reexamining its prior decisions, this Court noted that it was relying upon the same cases from other jurisdictions that it had previously relied on, stating:

> In the Chambers and Rossi cases, supra, we quoted at length from various leading cases in order to illustrate the reasoning supporting the view that good faith and probable cause should not protect the contesting legatees from the effects of the 'no-contest' provision. No point would be served by requoting from those opinions herein.

Id. at 300. This Court did note, however, that subsequent to the Rossi decision, the American Law Institute had rejected a good faith/probable cause exception. Id. This Court then identified a list of cases from other jurisdictions that it relied on in continuing to reject a good faith/probable cause exception, including:

Rudd v. Searles, 160 N.E. 882 (Mass. 1928)

Bradford v. Bradford, 19 Ohio St. 546, 1869 WL 90 (Ohio 1869)

Schiffer v. Brenton, 226 N.W. 253 (Mi. 1929)

Burtman v. Butman, 85 A.2d 892 (N.H. 1952)

Alper v. Alper, 65 A.2d 737 (N.J. 1949)

Elder v. Elder, 120 A.2d 815 (R.I. 1956)

In re Kitchen, 220 P. 301 (Cal. 1923)

Id. at 301.

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In reaffirming its rejection of the good faith/probable cause exception, this Court provided a synopsis of its prior analysis:

> It should be noted, however, that this court did not take a position on the question until it had thoroughly considered the authorities pro and con and the reasons supporting each view. In the Chambers and Rossi cases the court reviewed substantially all of the cases that had considered the question up to the time of those decisions. As heretofore indicated, those decisions represent the considered view of this court that 'no-contest' provisions should be enforced without regard to any exception based upon the good faith and probable cause of the contestant. We see no reason for departing from that rule. It rests upon a sound logical foundation and is supported by substantial authority. No new arguments have been advanced which are sufficient to demonstrate that Chambers and Rossi were unsound in the first instance.

Id.

In Cox v. Fisher, 322 S.W.2d 910 (Mo. 1959), this Court noted that it had previously rejected a good faith/probable cause exception in Chambers, Rossi and Commerce Trust. Id. at 913-14. Without reexamining that issue, this Court indicated that the rule from Chambers, Rossi and Commerce Trust continued to apply. Id. at 914.

In light of these cases, it is apparent that at the time this Court last addressed the issue of a good faith/probable cause exception, a majority of jurisdictions had rejected such an exception, and one commentator (the American Law Institute) had likewise rejected this exception. This Court likely concluded that it was joining the majority position nationally, and that its decision placed it well within the

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mainstream of American law. However, in the six decades since this Court last addressed this issue, the state of American law has changed considerably.

2. The current state of American law regarding application of a good faith/probable cause exception.

In the sixty years since this Court last addressed the potential application of a good faith/probable cause exception, there has been a substantial shift in American law regarding the application of such an exception. Beneficiary's counsel has conducted a national survey to assess which jurisdictions have adopted a good faith/probable cause exception by common law or statute. As noted in the table below, thirty-eight States have now adopted a good faith/probable cause exception by common law or statute (or both).

	Good faith/probable cause exception adopted by common law	**Good faith/probable cause exception adopted by statute**
Alabama		
Alaska		A.S. § 13.16.435
Arizona	In re Estate of Stewart, 286 P.3d 1089, 1091 (Ariz. App. 2012); In re Shaheen Tr., 341 P.3d 1169, 1171 (Ariz. App. 2015)	A.R.S. § 14–2517
Arkansas	Seymour v. Biehslich, 266 S.W.3d 722, 728 (Ark. 2007)	
California	Donkin v. Donkin, 314 P.3d 780, 790 (Cal. 2013)	CA Prob. Code § 21311

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Colorado	In re Estate of Peppler, 971 P.2d 694, 697 (Colo. App. 1998)	C.R.S. § 15-11-517; C.R.S. § 15-12-905
Connecticut	Thompson v. Estate of Thompson, 1999 WL 311241 at *4 (Conn. 1999); DiMaria v. Silvester, 89 F.Supp.2d 195, 199 (D. Conn. 1999); South Norwalk Trust Co. v. St. John, 101 A. 961, 963 (Conn. 1917)	
Delaware		
Florida	Porter v. Baynard, 28 So.2d 890, 897 (Fla. 1946)	F.S. § 732.517; F.S. § 736.1108
Georgia		
Hawaii		HRS § 560:2-517; HRS § 560:3-905
Idaho		Idaho Code § 15–3–905
Illinois	Wojtalewicz's Estate v. Woitel, 418 N.E.2d 418, 421 (Ill. App. 1981)	
Indiana		I.C. § 30-4-2.1-3
Iowa	In re Estate of Cocklin, 17 N.W.2d 129, 135 (Iowa 1945); Geisinger v. Geisinger, 41 N.W.2d 86, 93 (1950)	
Kansas	Hamel v. Hamel, 299 P.3d 278, 288 (Kan. 2013)	
Kentucky	Hurley v. Blankenship, 267 S.W.2d 99, 100 (Ky. 1954) (Recognizing good faith exception as to certain types of claims); Commonwealth Bank &	

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	Tr. Co. v. Young, 361 S.W.3d 344, 352-54 (Ky. App. 2012)	
Louisiana		
Maine		18-A M.R.S.A. § 3-905
Maryland		Md. Section 13-413 of the Estates and Trusts Article
Massachusetts		
Michigan		MCL § 700.2518; MCL § 700.3905; MCL § 700.7113
Minnesota	Hartz' Estate v. Cade, 77 N.W.2d 169, 171 (Minn. 1956)	Minn.Stat. § 524.2-517
Mississippi	Parker v. Benoist, 160 So. 3d 198, 200 (Miss. 2015)	
Missouri		
Montana		MCA § 72–2–537
Nebraska		Neb.Rev.St. § 30-24,103
Nevada	Hannam v. Brown, 956 P.2d 794, 798 (Nev. 1998)	N.R.S. § 137.005; N.R.S. § 163.00195
New Hampshire		
New Jersey	Haynes v. First Nat. State Bank of New Jersey, 432 A.2d 890, 904 (N.J. 1981)	N.J.S.A. § 3A:2A-32; N.J.S.A. § 3B:3-47
New Mexico	Matter of Seymour's Estate, 600 P.2d 274, 278 (N.M. Sup. 1979); Redman-Tafoya v. Armijo, 126 P.3d 1200, 1210 (N.M. App. 2005)	NMSA 1978, § 45–2–517
New York		NY EPTL § 3–3.5 (good faith exception limited to certain types of actions)

North Carolina	Ryan v. Wachovia Bank & Trust Co., 70 S.E.2d 853, 855-57 (N.C. 1952)	
North Dakota		N.D.C.C. §§ 30.1–20-05
Ohio		
Oklahoma	Barr v. Dawson, 158 P.3d 1073, 1076 (Okla. App. 2006)	
Oregon		O.R.S. § 112.272 (good faith exception limited to certain types of actions); O.R.S. § 130.235 (good faith exception limited to certain types of actions)
Pennsylvania	In re Friend's Estate, 58 A. 853, 854 (Pa. 1904)	20 Pa.C.S.A. § 2521
Rhode Island		
South Carolina	Russell v. Wachovia Bank, N.A., 633 S.E.2d 722, 726 (S.C. 2006)	S.C.Code Ann. § 62–3–905
South Dakota		SDCL § 29A-2-517; SDCL § 29A-3-905
Tennessee	Winningham v. Winningham, 966 S.W.2d 48, 51 (Tenn. 1998)	
Texas		V.T.C.A., Property Code § 112.038
Utah		U.C.A. 1953 § 75-3-905
Vermont		
Virginia		
Washington	In re Kubicks' Estate, 513 P.2d 76, 79-80 (Wash. App. 1973); In re Estate of Mumby, 982 P.2d 1219, 1224 (Wash. App. 1999)	
West Virginia	Dutterer v. Logan, 137 S.E. 1, 2-3 (W.Va. 1927)	

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Wisconsin	In re Keenan's Will, 205 N.W. 1001, 1007 (Wis. 1925)	W.S.A. § 854.19
Wyoming		

Two other states – Delaware and Georgia – have essentially recognized an administration exception to no-contest clauses (as Beneficiary seeks in this case), although not specifically stated in terms of "good faith" or "probable cause."

In Ughetta v. Cist, 2015 WL 3430094 (Del. Ch. 2015), the Delaware Court addressed a trustee's argument that a beneficiary's action, challenging the trustee's administration of the trust, had triggered a no-contest clause. Id. at *15. The beneficiary argued that her action did not trigger the no-contest clause because she was "challenging the administration of the trust in an effort to enforce the express language of the trust." Id. The Court agreed, citing Missouri's Labantschnig decision for the proposition that "there is a distinction between a challenge to the propriety of a trustee's actions and an attack on the provisions of the trust itself." Id. at 16. The Court concluded that the beneficiary did not trigger the no-contest clause because she was "not seeking to alter or change any of the provisions of [the] trust," but was instead "attempting to enforce the provisions" of the trust. Id.

Similarly, in Callaway v. Willard, 739 S.E.2d 533, 536-37 (Ga. App. 2013), the Georgia Court of Appeals stated: "[O]ur Supreme Court has held that, as a matter of public policy, in terrorem clauses may not be construed so as to immunize a

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fiduciary from the law that imposes certain duties upon and otherwise governs the actions of such fiduciaries."

Virginia has acknowledged a potential good faith/probable cause exception, but has declined to rule on the issue. Womble v. Gunter, 95 S.E.2d 213, 218 (Va. 1956). Two other states – Louisiana and Vermont – do not appear to have addressed the issue of whether there is a good faith/probable cause exception to no-contest clauses.

The only states counsel has located in which the issue of a good faith/probable cause exception has been expressly considered and rejected are: Alabama, Massachusetts, Missouri, New Hampshire, Ohio, Rhode Island and Wyoming.

As the above authorities illustrate, the clear modern trend across jurisdictions is to recognize a good faith/probable cause exception to no-contest clauses. Numerous authorities and commentators have observed that adoption of a good faith/probable cause exception is the majority rule nationally. See, e.g., RESTATEMENT (THIRD) OF PROPERTY (WILLS & DON. TRANS.) § 8.5 cmt. a ("[T]he majority of decisions and statutes, provide[] that a no-contest clause is valid and enforceable unless the challenge was based on probable cause."); RESTATEMENT (SECOND) OF PROPERTY, DON. TRANS. § 9.1, Reporter's Note 2 ("The position taken by this Restatement, that a no-contest condition is unenforceable against one who, with probable cause, contests a will or other donative transfer on any ground, is the

law in a majority of American states."); Gerry W. Beyer, Rob G. Dickinson and Kenneth L. Wake, The Fine Art of Intimidating Disgruntled Beneficiaries With *In Terrorem* Clauses, 51 SMU L. Rev. 225, 247 (1998) ("The majority of American jurisdictions refuse to enforce *in terrorem* clauses if the contestants act with good faith and probable cause.").

Similarly, courts in other jurisdictions have observed that a majority of jurisdictions have adopted a good faith/probable cause exception. See, e.g., Russell v. Wachovia Bank, N.A., 633 S.E.2d 722, 726 (S.C. 2006) ("[A] majority of jurisdictions[] have recognized an exception to the general rule that no-contest clauses are valid and enforceable."); Hannam v. Brown, 956 P.2d 794, 798 (Nev. 1998) ("[W]e recognize a clear trend favoring an exception for good faith challenges based on probable cause."); Haynes v. First Nat. State Bank of New Jersey, 432 A.2d 890, 903-04 (N.J. 1981) ("[A] majority of jurisdictions have declined to enforce *in terrorem* clauses where challenges to testamentary instruments are brought in good faith and with probable cause.").

It is also worth noting that the view of commentators has likewise shifted in the preceding sixty years. For example, when this Court issued its decision in Commerce Trust in 1958, this Court noted that the American Law Institute had recently rejected a good faith/probable cause exception to no-contest clauses. Commerce Trust, 318 S.W.2d at 300. However, the American Law Institute has

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subsequently changed its position, and come down firmly in favor of a good faith/probable cause exception.

The Restatement (Third) of Property recognizes a good faith/probable cause exception, stating as follows:

> 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**.

RESTATEMENT (THIRD) OF PROPERTY (WILLS & DON. TRANS.) § 8.5 (emphasis added). The comments to this Section provide that "[a] no-contest clause, also called an *in terrorem* clause, is enforceable unless probable cause existed for instituting the proceeding." Id. at § 8.5 cmt. a. The comments further state that "[w]hen the contestant establishes that there was probable cause for instituting the proceeding, it would be a contravention of public policy to enforce the no-contest clause." Id. at § 8.5 cmt. b.

The Restatement (Second) of Property also recognizes a good faith/probable cause exception, stating as follows:

> An otherwise effective provision in a will or other donative transfer, which is designed to prevent the acquisition or retention of an interest in property in the event there is a contest of the validity of the document transferring the interest or an attack on a particular provision of the document, is valid, **unless there was probable cause for making the contest or attack**.

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RESTATEMENT (SECOND) OF PROPERTY, DON. TRANS. § 9.1 (emphasis added). The comments to this Section recognize that the good faith/probable cause exception is grounded in considerations of public policy:

> When, however, the contestant establishes that there was probable cause, there is a public interest in having the donative transfer challenged. It would be a contravention of public policy to place a deterrent upon such action. Hence, the rule of this section does not permit the risk of a forfeiture of a transfer to be imposed when there is probable cause to believe the donative transfer is not valid.

Id. at § 9.1 cmt. a.

The Uniform Probate Code ("UPC") contains two identical provisions which state as follows: "A provision in a will purporting to penalize an interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings." UNIFORM PROBATE CODE §§ 2-517, 3-905 (2010).

Other commentators have likewise expressed support for recognition of a good faith/probable cause exception. For example, in Loring and Rounds: A Trustee's Handbook, the authors express the view that a good faith/probable cause exception is inherent in the very concept of a trust:

> Assuming that the settlor intended to impress a trust upon the property, not to make a gift to the 'trustee,' it would seem inconsistent with the concept of the trust for a court to apply a 'no contest' clause to . . . good faith actions brought by beneficiaries to construe the terms of governing instruments or to remedy breaches of trust. Accountability, after all, is the glue that holds the institution of the trust together.

Loring and Rounds: A Trustee's Handbook, pp. 405-06 (2013).

3. This Court should follow the national trend, and adopt a good faith/probable cause exception to the enforcement of no-contest clauses.

The above analysis illustrates that, far from being a majority position, this Court's prior rejection of a good faith/probable cause exception is currently an extreme minority position. Furthermore, analysis of the applicable Missouri cases illustrates that the foundation for this Court's prior rejection of a good faith/probable cause exception has been substantially undermined.

Taken together, this Court's decisions in Chambers, Rossi, Commerce Trust, and Cox relied upon twelve cases in refusing to adopt a good faith/probable cause exception. The cases that this Court relied upon are: Donegan v. Wade, 70 Ala. 501, 1881 WL 1297 (Ala. 1881); In re Kitchen, 220 P. 301 (Cal. 1923); In re Miller's Estate, 103 P. 842 (Cal. 1909); Moran v. Moran, 123 N.W. 202 (Iowa 1909); Rudd v. Searles, 160 N.E. 882 (Mass. 1928); Schiffer v. Brenton, 226 N.W. 253 (Mi. 1929); Burtman v. Butman, 85 A.2d 892 (N.H. 1952); Alper v. Alper, 65 A.2d 737 (N.J. 1949); Hoit v. Hoit, 7 A. 856 (N.J. App. 1886); Bender v. Bateman, 168 N.E. 574 (Ohio App. 1929); Bradford v. Bradford, 19 Ohio St. 546, 1869 WL 90 (Ohio 1869); Elder v. Elder, 120 A.2d 815 (R.I. 1956).

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This list of cases, that this Court relied upon in refusing to adopt a good faith/probable cause exception, consists of cases from nine states: Alabama, California, Iowa, Massachusetts, Michigan, New Hampshire, New Jersey, Ohio and Rhode Island. Of those nine states, four have subsequently reversed position and adopted a good faith/probable cause exception: California, Iowa, Michigan and New Jersey (see table above). Thus, nearly half of the jurisdictions that this Court looked to in concluding that it was adopting a "majority" position have subsequently abandoned the position taken by Missouri.

It is also clear that, since this Court last addressed the issue, there has been a strong trend nationally to adopt a good faith/probable cause exception. Of the six states other than Missouri which have refused to adopt a good faith/probable cause exception, five of those states reached that conclusion in 1956 or earlier: Donegan v. Wade, 70 Ala. 501, 1881 WL 1297 (Ala. 1881); Rudd v. Searles, 160 N.E. 882 (Mass. 1928); Burtman v. Butman, 85 A.2d 892 (N.H. 1952); Bradford v. Bradford, 19 Ohio St. 546, 1869 WL 90 (Ohio 1869); Elder v. Elder, 120 A.2d 815 (R.I. 1956). The only one of those six states which refused to adopt a good faith/probable cause exception subsequent to Missouri was Wyoming, which reached that conclusion in 1983. Dainton v. Watson, 658 P.2d 79, 81 (Wyo. 1983). No state which has addressed the issue since 1983 has rejected a good faith/probable cause exception. To the contrary, many states have now codified such exceptions in their statutes.

There is simply no dispute that the position adopted by this Court sixty years ago (i.e. rejecting a good faith/probable cause exception) is now a minority position. It is also clear that the majority and minority positions are not close: thirty-eight states have adopted a good faith/probable cause exception while only seven (including Missouri) have refused to adopt a good faith/probable cause exception.

In light of these facts, it appears that sixty years ago this Court adopted a rule that it viewed as a majority position, but which turned out to be an extreme minority position. With the exception of Wyoming, Missouri was the last jurisdiction to join this minority position. In contrast, the majority of jurisdictions have adopted a good faith/probable cause exception, and most of them have done so subsequent to Missouri's refusal to adopt the exception. Thus, it appears that this Court committed itself to the minority position shortly before the tide turned.

Finally, it is important to note that there have been significant changes to Missouri trust law since this Court last addressed the application of a good faith/probable cause exception. Specifically, adoption of the MUTC in 2005 incorporated multiple standards into Missouri law which are at odds with the rejection of a good faith/probable cause exception. Although the MUTC does not directly address no-contest clauses, it does address other issues which are analogous.

Section 1008 of the MUTC provides that "[a] term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that it . . . relieves the

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trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries." R.S.Mo. § 456.10-1008.1(1). This provision is based upon Section 1008 of the Uniform Trust Code ("UTC"). The comments to that UTC Section state: "Even if the terms of the trust attempt to completely exculpate a trustee for the trustee's acts, the trustee must always comply with a certain minimum standard. As provided in subsection (a), a trustee must always act in good faith with regard to the purposes of the trust and the interests of the beneficiaries." UNIFORM TRUST CODE § 1008 cmt. (2010).

While Section 1008 of the MUTC does not directly address no-contest clauses, it certainly exhibits a general understanding that the terms of a trust cannot wholly insulate a trustee from accountability to beneficiaries. Furthermore, the MUTC indicates that this limitation cannot be varied by the settlor. R.S.Mo. § 456.1-105.2(10). Thus, the notion that a no-contest clause would apply without exception under any circumstances – including circumstances involving a "breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries" – would be contrary to the spirit, if not the letter, of the MUTC.

More generally, the MUTC recognizes that there are certain core obligations of a trust that are inherent in the nature of a trust. For example, the MUTC provides

that "a trust is created only if . . . the trustee has duties to perform." R.S.Mo. § 456.4-402. The MUTC also provides that "[a] trust and its terms must be for the benefit of its beneficiaries." R.S.Mo. § 456.4-404. Thus, the notion that a no-contest clause would apply without exception under any circumstances – including circumstances in which the clause attempts to remove all duties of the trustee or attempts to relieve the trustee of the duty to act for the benefit of the beneficiaries – again would be contrary to the spirit, if not the letter, of the MUTC.

In light of the changes in national law over the past sixty years, and the adoption of the MUTC in Missouri, the time is ripe for this Court to reexamine its prior rejection of a good faith/probable cause exception. This Court's prior rulings on this issue represent an outdated view that is now an extreme minority position. Beneficiary asks this Court to join the large majority of jurisdictions nationwide which have adopted a good faith/probable cause exception.

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CONCLUSION

For the reasons stated herein, Beneficiary requests that this Court reverse the judgment of the Circuit Court granting summary judgment to Trustee, and remand this action for further proceedings consistent with this Court's decision. Beneficiary further requests that this Court issue one or both of the following holdings:

1. Hold that no-contest clauses may only be applied to actions which seek to challenge a trust instrument, and that no-contest clauses do not apply to actions for breach of trust and/or removal of a trustee.
2. Hold that no-contest clauses are subject to a good faith/probable cause exception.

Respectfully submitted,

By: /s/ Michael W. Blanton

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Substitute Brief includes the information required by Rule 55.03, and that this Substitute Brief conforms to the type-volume limitations set forth in MO. R. CIV. P. 84.06(b) in that the Substitute Brief contains 21,009 words, excluding the cover, certificate of service, certificate of compliance and signature block, as counted using Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Rule 103.08, a copy of the foregoing document was furnished through the Missouri Electronic Filing System to the following on this 19th day of September, 2019:

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