Mercer Law Review

Volume 74
Number 5 *MLR Online Companion*

Article 6

6-2023

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Kiana Johnson

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Kiana Johnson*

I. INTRODUCTION

Imagine a television infomercial wakes you up from your sleep. While refocusing your vision, you faintly hear the television say: "Are you a disgruntled beneficiary?" You think to yourself, "I'm not disgruntled, but I sure wish I could have more money." You are slightly intrigued, so you crank up the volume on the television, and the infomercial emphatically states, "Do you believe you are entitled to 'ill-gotten gains'?" You think to yourself, "I have no idea what ill-gotten gains are." I just want ownership over the assets I —."

The television ad interrupts your contemplation with the solemn question, "Has a departed loved one's lingering authority over inherited property caused harm to you, a friend, or family member?" You glance

*Thank you to my faculty advisor, Dean Karen Sneddon, for aiding me throughout the entire drafting process and demonstrating that unconventional introductions with a touch of humor may nonetheless be published. I want to thank my mom, Nashanuna Howard, for constantly motivating me to strive for excellence. I also want to thank my fiancé, Trent Talton, Jr., for the endless support and the warm blankets and socks he provided me so that I could write in comfort. Thank you to Sabrina and Trent Talton for all of your proofreading and prayer. Thank you to my family and friends that help me "imagine a world" where anything is possible. In closing, I want to express my gratitude to God, without whom none of this would have been possible. In memory of Taleah Cunningham.

about your house and wonder, "Wait a minute, is this advertisement reading my mind?" After a little delay, the television announces, "Of course, we're not reading your mind. We are here to inform you, according to the Georgia Court of Appeals's reasoning in *Giller v. Slosberg*,[1] if you are willing to secure a trust's assets by holding a gun to a settlor's head and have the foresight to insert an *in terrorem* clause, you may be entitled to financial compensation." "That's absurd!" your inner monologue continues. "The American court system would never permit such terrible public policy." You switch off the television and go back to sleep, certain that everything you have just heard was a dream—but what if it wasn't?

Prior to the Supreme Court of Georgia's ruling in *Slosberg v. Giller*,[2] legal instruments containing an *in terrorem* clause, commonly referred to as a no-contest clause, permitted those whose influence overpowered the decedent's free will to escape liability with unjustly received benefits. The court of appeals' acknowledged that it was against public interest to allow a person to exert undue influence over a trust's formation to employ *in terrorem* clauses to cloak their actions.[3] The court reached its decision based on this assumption, holding that it is not the role of the judiciary to create public policy.[4]

Refusing to skip common law's prologue, the supreme court reversed the court of appeals holding. [5] The court recognized in *Giller* that an *in terrorem* clause does not prevent an interested beneficiary from initiating legal proceedings to contest the valid formation of a trust; because contesting the validity of a legal instrument is a matter of common law and not public policy.[6]

II. FACTUAL BACKGROUND

A bitter battle between siblings occurred when their elderly father revoked an existing power of attorney (POA), issued a new POA, and modified crucial financial accounts linked to his estate-planning strategy.[7] In the latter years of David Slosberg's life, he was reportedly entangled in intense disputes between his children over the management

1. 359 Ga. App. 867, 858 S.E.2d 747 (2021).

2. 314 Ga. 89, 93, 876 S.E.2d 228, 231 (2022).

3. *Giller v. Slosberg*, 359 Ga. App. 867, 858 S.E.2d 747 (2021).

4. *Id. at* 872, 858 S.E.2d 752.

5. *Giller*, 314 Ga. at 90, 876 S.E.2d at 230.

6. *Id.* at 96*,* 876 S.E.2d at 234.

7. Appellant's Principal Brief at 4, Slosberg v. Giller, 314 Ga. 89, 93 (2022) (No. S21G1226).

of his affairs.[8] These occurrences included legal proceedings, outbursts of yelling, incrimination, physical altercations, restraining orders, and complaints filed with the police.[9]

Nevertheless, this dispute started with two parents, David and Myrna Slosberg, who just wished to distribute their wealth evenly among their children. When Myrna passed away in 2007, David designated his son, Robert (Bobby) Slosberg as his agent under a properly executed power of attorney. After David was admitted to the hospital for surgery in October 2011, the family's formerly peaceful dynamic began to deteriorate. David began to exhibit signs of diminished mental capacity, which emphasized the necessity of the durable POA authorizing Bobby to act as his attorney-in-fact.[10]

The first hint of impending strife between the siblings arose in 2012, when David's daughters Suzanne (Suzy) Giller and Lynee (Amy) Seidner sought to replace their brother Bobby as their father's attorney-in-fact.[11] David reportedly confided in his former attorney, Steve Merlin, that David feared he was "being brainwashed" after signing a new POA on February 22, 2013. This POA was designated to all three of his children with a majority rule, and then six days later, David executed a second POA that entirely excluded Bobby as David's attorney-in-fact. Because of the new POA, David's daughters now had exclusive authority to make decisions on their father's behalf.[12]

Employing that authority, the sisters made their next move, and the second point of contention arose in late April 2013. David's long-time accountant, Dick Babush, and financial advisor, Roger Sullivan, were asked to transfer the late Myrna Slosberg's trust assets, as well as all of David's assets, from Wells Fargo in Atlanta to First National Bank & Trust (FNBT) in Wisconsin.[13] The disparity between these requests and David's previous conservative approach to investing concerned Babush and Sullivan. However, when they approached David about these transactions, he denied knowledge of the transfer of his assets.[14]

In March of 2013, the controversy intensified.[15] Bobby claimed that after years of visiting his father several times per week, Amy and Suzy

8. Brief of Appellees at 3, Giller v. Slosberg, 359 Ga. App. 867, 858 S.E.2d 747 (2021) (No. A21A0001).

9. *Id.* at 3–4.

10. Appellant's Principal Brief at 4–5, *Giller*, 314 Ga. 89 (No. S21G1226).

11. Appellant's Principal Brief, *supra* note 10, at 6; see also *Slosberg v. Giller*, 341 Ga. App. 581, 583, 801 S.E.2d 332, 335 (2017).

12. *Id.*

13. Appellant's Principal Brief, *supra* note 10, at 6–7.

14. *Id.*

15. Appellant's Principal Brief, *supra* note 10, at 7.

began isolating David. Bobby reported that in the final year and a half of his father's life, he was only allowed to visit him four times.[16]

The sibling rivalry significantly escalated when David created the David K. Slosberg Asset Protection Trust (Trust #2) on January 17, 2014.[17] The irrevocable trust stated Bobby would receive a "nominal gift" of $25,000 upon David's passing and that the remaining 80% of the trust's assets would be divided evenly between Suzy and Amy.[18] While David had previous trust agreements, Trust #2 was distinctive in that it featured the following *in terrorem* clause:

> [S]hould my son, ROBERT KENNETH SLOSBERG, or his legal representative, or either of my daughters, or their legal representatives[,] contest or initiate legal proceedings to contest the validity of this Trust or my Last Will and Testament executed by me and dated October 31st, 2013, or any provision from being carried out in accordance with its terms as I expressed (whether or not in good faith and with probable cause), then all the benefits provided herein for my son and/or for my daughters are revoked and annulled. Such benefits, if not a part of the residue of my estate, shall go over to and become a part of the remainder of my Trust Estate.[19]

In essence, the *in terrorem* clause stated that if any of David's children, namely Bobby, contested or initiated legal proceedings to challenge the validity of the trust instrument, the challenger would be barred from receiving any assets from that trust. The challenger would effectively forfeit his or her share of the trust property.

The family's controversy reached its boiling point in May of 2013. Bobby filed a claim for declaratory judgment a year before David passed away, alleging that his sisters, Suzy, and Amy, had used undue influence to change their father's inheritance plan.[20]

A year after their father's death on August 31, 2014, Bobby filed his third amended complaint to consist of several claims, most importantly asserting undue influence.[21] In his complaint, Bobby sought relief in the form of a constructive trust and injunctive relief to prohibit his sisters from receiving any benefits to which he would be entitled.[22]

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16. *Id*.
17. *Giller*, 314 Ga. at 90, 876 S.E.2d at 230.
18. *Id*.
19. *Giller*, 359 Ga. App. at 870–71, 858 S.E.2d at 751.
20. *Id.* at 868, 858 S.E.2d at 749.
21. *Id*.
22. *Slosberg*, 314 Ga. at 91, 876 S.E.2d at 231.

After a two-and-a-half-week trial,[23] the trial court concluded the trust instrument was void due to Suzy and Amy's undue influence.[24] Suzy and Amy filed a motion for judgment notwithstanding the verdict. [25] Not disputing that their "father's actions were the product of diminished capacity and undue influence,"[26] but "that the in terrorem clause . . . precluded [Bobby] from asserting the undue-influence claim in the first place."[27]

The trial court denied the motion.[28] The Georgia Court of Appeals, however, reversed after hearing Suzy and Amy's pleas for an appellate correction of a potentially everlasting trial court error on Georgia case law.[29] Despite Suzy and Amy's "undisputed role in unduly influencing their father to secure the trust containing the in terrorem clause," the court was "constrained to conclude that [Bobby's] 'initiation of legal proceedings triggered the (trust's) in terrorem clause.'"[30]

Following this holding, a petition for writ of certiorari was filed in July of 2021.[31] The Supreme Court of Georgia was urged to approve the petition in an amicus curiae brief that was filed by twenty-three Georgia estate planning attorneys.[32]

The supreme court granted certiorari to address whether an *in terrorem* clause barred a plaintiff's claim and resulted in forfeiture of any benefits from the trust.[33] Specifically, the court evaluated whether an *in terrorem* clause precludes an individual from even initiating a legal proceeding to challenge the clause. This court held that an individual's initiation of legal proceedings or challenge to an invalid legal instrument does not trigger a forfeiture of the trust instrument's assets.[34]

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23. *Giller*, 359 Ga. App. at 868, 858 S.E.2d at 749.
24. *Id.*
25. *Id.* at 869, 858 S.E.2d at 750.
26. *Id.* at 868, 858 S.E.2d at 749.
27. *Slosberg*, 314 Ga. at 93, 876 S.E.2d at 231.
28. *Id.* at 90, 876 S.E.2d at 230.
29. Brief of Appellees, *supra* note 8, at 2.
30. *Slosberg*, 314 Ga. at 93, 876 S.E.2d at 232.
31. *Id.* at 95, 876 S.E.2d at 233.
32. Amicus Curiae Brief, Slosberg v. Giller, 314 Ga. 89, 93 (2022) (No. S21G1226).
33. *Slosberg*, 314 Ga. at 95, 876 S.E.2d at 233.
34. *Id.* at 90, 876 S.E.2d at 230.

III. LEGAL BACKGROUND

A. Trust Instruments

A trust is a fiduciary relationship resulting from a settlor's intention to impose legal obligations on a person to retain, manage, or otherwise administer property for the benefit of another person.[35] In general, a private trust's terms are whatever the settlor intended them to be when the trust was established, provided that the terms are legal.[36] A majority of express trust disputes—even when the initial facts arose during the settlor's lifetime—occur after the settlor has died.[37] As a result, the "touchstone" for understanding a trust instrument is the settlor's intent.[38]

The settlor's intent is especially relevant in the case of irrevocable trusts. An irrevocable trust generally prohibits the settlor from unilaterally terminating the trust.[39] The transfer of assets is permanent, and the settlor no longer has control or legal protections over the assets.[40]

While irrevocable trusts are useful for asset protection, they may also be exploited by those seeking unjust enrichment. For this reason, a trust is invalid to the degree that it was acquired by fraud, duress, or undue influence.[41] Because undue influence replaces the settlor's wishes for those of the influencer, the settlor's intent is essentially destroyed. Accordingly, when the person with legal title to the property is unable to enjoy the beneficial interest in the property without violating some recognized principle of equity, a constructive trust may be formed to avoid unjust enrichment.[42] Fortunately, various estate planning mechanisms are designed to protect the settlor's donative intent. Some of these mechanisms, however, can easily be manipulated to undermine the freedom of disposition.

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35. Heiman v. Mayfield, 300 Ga. App. 879, 882, 686 S.E.2d 284, 287 (2009).

36. Miller v. Walker, 270 Ga. 811, 815 (514 S.E.2d 22) (1999) ("[T]he cardinal rule in construing a trust instrument . . . is to discern the intent of the settlor and to effectuate that intent within the language used and within what the law will permit.").

37. Jane B. Baron, *The Trust Res and Donative Intent* 61, TUL. L. REV. 45 (1968).

38. D. GORDON, ET AL., EXPERIENCING TRUSTS AND ESTATES, 1, 824 (2d. ed 2021).

39. Grace C. Pippin, *Characteristics and Uses of Trusts (GA)*, Pippin Law P.C. (2022); see also Andrew T. Huber, *Trust Protectors: The Role Continues to Evolve*, Probate & Property Magazine (2022) (outlining the roles of trust protectors' supervision of specific trust decisions).

40. Pippin, *supra* note 39.

41. Appellant's Principal Brief, *supra* note 10, at 17–18.

42. Jane B. Baron, *The Trust Res and Donative Intent* 61, TUL. L. REV. 45 (1968). See Restatement (Third) of Restitution and Unjust Enrichment § 55 (Am. L. Inst. 2011).

B. The Terrifying In Terrorem Clause

An *in terrorem* clause, also known as a no-contest clause or a forfeiture clause, is a Latin phrase that translates to "in order to frighten."[43] An *in terrorem* clause is "[a] clause designed to threaten to dispossess any beneficiary who challenges the terms" of a legal instrument.[44] The first known instance of an *in terrorem* clause was enacted in the thirteenth century B.C., when it was inserted in the will of a Mesopotamian man.[45] Since then, *in terrorem* clauses have been used to deter vexatious and frivolous litigation by exposing the challenger to the possibility of losing all benefits if the challenge is rejected and the will or trust remains intact.[46]

Testamentary freedom has been established by courts as the cornerstone of Anglo-American succession law.[47] By permitting a settlor to freely gift or withhold property, *in terrorem* clauses exhibit a high level of testamentary freedom.[48] Accordingly, arguments in favor of rigidly implementing an *in terrorem* clause rest on its capacity to (1) give full effect to the testator's intent; (2) help avoid expensive and frivolous litigation; and (3) reduce family disputes.[49]

Since 1590, the English common law has tacitly acknowledged that an *in terrorem* clause may be challenged by contesting the validity of the will containing the clause based on fraud, duress, undue influence, or incapacity.[50] As a result, a settlor may use an *in terrorem* clause as a structural mechanism for protective estate planning.[51]

1. Dead Hand versus Living Hand

Nevertheless, if the settlor of a property interest seeks to restrict the beneficiary's interest, the legal system must determine whether to enforce or invalidate any limitations presented by the settlor of a

43. *Slosberg,* 314 Ga. at 89, 876 S.E.2d at 229.

44. *Id.*

45. Brief of Appellees, *supra* note 8, at 5.

46. Appellant's Principal Brief, *supra* note 10, at 33.

47. Brief of Appellees, *supra* note 8.

48. Alexis A. Golling-Sledge, *Testamentary vs. The Natural Right to Inherit: The Misuse of No-Contest Clauses as Disinheritance Devices*, 12 WASH. U. JUR. REV. 143 (2019).

49. *Id.*

50. *Slosberg*, 314 Ga. at 96, 876 S.E.2d 228.

51. D. GORDON. ET AL., *supra* note 38, at 298.

property interest.[52] The legal system is essentially deciding whether to protect the freedom of the settlor or the beneficiary.[53]

At one end of the spectrum, the courts will be asked to consider the plain language of the deceased person's donative intent, concerns about testamentary privacy, and the desire to prevent superfluous legal procedures.[54]

On the opposite end of the spectrum, courts must assess the beneficiaries' interest in contesting a legal document based on good faith and probable cause to ensure that the decedent's intent was not overwhelmed by criminal action such as undue influence, fraud, duress, or forgery.[55] Consequently, the enforceability of *in terrorem* clauses often leads to a standoff between individual rights and the protections provided by the United States Constitution and state law. The court must determine which takes precedence: the public policy of a State or Nation, or the unchecked pulse of a settlor's dead hand.[56]

a) Dead Hands Refuse to be Buried

The term "dead hand" refers to the policy consideration that allows the preferences of a deceased person to dictate what happens in the future. [57] The concept of dead hand is occasionally used as a policy consideration to limit the freedom of disposition. One of the primary concerns posed by dead hand is the limit of fulfilling a settlor's donative intent.[58]

Without the emergence of principles restraining the reach of dead hand control, it would be conceivable for property owners to control the succession of property for endless generations.[59] This concept is in opposition to the common law premise that: "[t]he right to acquire, and the personal exercise of power and dominion over property while the blood of life courses through the veins must end when men pass into the unknown."[60] To that extent, the rule against restraints on alienation and the rule against perpetuities have served measurably to curb dead hand

52. Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*., 37 STAN. L. REV. 1189, 1189 (1985).

53. *Id.*

54. Kara Blanco & Rebecca E. Whitacre, *The Carrot and Stick Approach: In Terrorem Clauses In Texas Jurisprudence*, 43 TEX. TECH L. REV. 1127, 1138 (2011).

55. *Id.*

56. *In re* Estate of Andrus, 156 Misc. 268, 289, 281 N.Y.S. 831, 858 (Sur. Ct. 1935).

57. D. GORDON. ET AL., *supra* note 38, at 71.

58. *Id.*

59. RICHARD R. POWELL, 6 POWELL ON REAL PROPERTY § 42.25, n.16 (2022).

60. *In re* Estate of Andrus, 156 Misc. at 291.

control by impeding wealthy people's attempts to keep their property under the terms of their control for generations.[61]

The rule against restraints on alienation assures that current, vested interests can still be transferred. The rule against perpetuities prevents individuals from creating estates and interests that could last forever and constrain the transferability of property for too long.[62] These concepts, namely the rule against perpetuities, may seem more horrifying to legal practitioners than dead hand control due to its convoluted implementation and ancient wording.[63] These principles were developed to prevent excessive dead hand control of familial property held through intergenerational transfers.[64]

The evolution of the modern trust was followed by persistent attempts by English settlors to assure the continuous enjoyment of property for their beneficiaries without the events of alienability and availability to creditors.[65] Settlors attempted to enforce their dead hand control in this context by enacting spendthrift clauses that prohibited beneficiaries of equitable interest from transferring the trust's interest and limited the conditions under which creditors might obtain that interest.[66] Similar efforts were denied in England due to a fundamental tenet of English law that no one should have an estate free from obligation of their debts; American courts deviated from the English rule and sided with the settlor's intention, allowing spendthrift clauses.[67]

The origin of spendthrift trusts in the United States is generally attributed to *Nichols v. Eaton*.[68] In 1882, the decision in *Broadway National Bank v. Adams*[69] established the validity of spendthrift trusts in the United States by declaring that a donor may dispose of his property as he sees fit unless it is detrimental to the public interest or used to defraud creditors.[70]

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61. POWELL, *supra* note 59, at n.16.

62. *Id.*

63. D. GORDON. ET AL., *supra* note 38, at 432.

64. Restat. 3d of Prop.: Servitudes, § 3.3 (3rd 2000).

65. POWELL, *supra* note 59, at n.16.

66. *Id.*

67. *Id.*

68. Nichols v. Eaton, 91 U.S. 716, 727, 23 L.Ed. 254, 257 (1875) ("Nor do we see any reason, in the recognized nature and tenure of property and its transfer by will, why a testator who gives, who gives without any pecuniary return, who gets nothing of property value from the donee, may not attach to that gift the incident of continued use, of uninterrupted benefit of the gift, during the life of the done.").

69. 133 Mass. 170 (1882).

70. *Id. at* 173.

Soon after the introduction of the spendthrift trust, the Claflin doctrine shielded private trusts against beneficiary efforts to dismantle them by early termination.[71] Implicitly hidden beneath the surface of these doctrines was the proposition that a settlor has significant control over the disposition, including the ability to freely decide to disinherit a beneficiary that challenges the donative intent of their dispositions. Collectively, these doctrines exacerbated the tension between trust and property; equity and law; and the right to dispose of one's assets as one sees fit.[72]

Over time, many courts sided with the living. The Texas Constitution supports this inference, stating that "perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed."[73] Similarly, at least two states, Florida and Indiana, have statutes that make any *in terrorem* clauses in a will or trust instantly null and void.[74] Critics assert that this approach will encourage beneficiaries who are unsatisfied with their share to waste time and resources on meritless litigation.[75] The opposing viewpoint is that a deceased settlor should not be permitted to exploit the legal system to restrict the rights and obligations of their beneficiaries after death.[76]

b) Living Hands Draft Public Policy

While dead hands cling to their last vestiges of property ownership, living hands draft governmental policies that place constraints on such transactions. Because the notion of separation of powers is an inviolable constitutional principle that must be rigorously upheld, judges must be careful not "add a line" to the law from the bench.[77] Consequently, statutes in deviation of the common law must be restricted to the language used and not stretched beyond their simple and unambiguous words.[78] This caveat has somewhat perplexing implications when courts are asked to evaluate whether a good faith/probable cause challenge to a legal instrument should be shielded from the sharp sting of an *in terrorem* clause.

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71. Alexander, *supra* note 52, at 1191.

72. *Id.*

73. Tex. Const. Art. I, § 26.

74. Gerry W. Beyer et al., *The Fine Art of Intimidating Disgruntled Beneficiaries with In Terrorem Clauses*, 51 SMU L. REV. 225, 243 (1998).

75. *Id.*

76. *Id.*

77. Morse v. SunTrust Bank, N.A., 346 Ga. App. 571, 581, 873 S.E.2d 238, 264 (2022).

78. *Id.*

At least eleven states, the Uniform Probate Code (UPC), and the Restatement (Second) of Property enable beneficiaries to contest a legal document without activating an *in terrorem* clause through a probable cause/good faith exception.[79] Essentially, if there is good faith/probable cause for initiating the dispute or challenge, then this limited exemption may reduce or even remove the enforceability of an *in terrorem* clause.[80] To remove the legal barrier that *in terrorem* clauses present when beneficiaries pursue good faith challenges against beneficiaries who may have exploited the deceased to obtain their property, certain jurisdictions have implemented good faith/probable cause exceptions to *in terrorem* clauses.[81] These jurisdictions recognize that a designated beneficiary who contests a will in good faith and for probable cause does not forfeit his interest in the estate of the deceased even if the document includes an *in terrorem* clause.[82]

Conversely, other jurisdictions do not recognize good faith/probable cause exceptions to enforcing an *in terrorem* clause.[83] This viewpoint supports the inference that allowing any exemption to an *in terrorem* clause undermines the settlor's ultimate intentions.[84] Nevertheless, issues can develop for jurisdictions that do not recognize a good faith/probable exception when beneficiaries gamble on the illusive balance of an all-or-nothing challenge.

C. The Illusive Balance of an All or Nothing Challenge

In Georgia, "a predicate for an in terrorem clause's operation is the valid formation of the legal instrument in which the clause is embedded."[85] If the legal instrument is invalid, then the clause is not valid.[86] After all, a clause within an invalidly created instrument has no legal effect.[87] This occurrence essentially places a challenger of a legal instrument in an "'all or nothing' position: if the beneficiary wins and the . . . trust is voided, the in terrorem clause is also voided. On the other

79. Restat. 2d of Prop.: Donative Transfers, § 9.1.

80. *Blanco & Whitacre*, *supra* note 54, at 1138–39.

81. *Id.*

82. Validity and enforceability of provision of will or trust instrument for forfeiture or reduction of share of contesting beneficiary, 23 A.L.R. 4th 369, 3.

83. Duncan v. Rawls, 359 Ga. App. 715, 720, 859 S.E.2d 857, 862 (2021). (holding *in terrorem* clauses are enforceable against challenges to a will or trust itself, such as a caveat that seeks to destroy such instruments altogether, and no good faith/probable cause exception exists).

84. Brief of Appellees, *supra* note 8, at 28.

85. *Slosberg*, 314 Ga. at 96, 876 S.E.2d at 234.

86. *Id.* at 97, 876 S.E.2d at 234.

87. *Id.* at 99, 876 S.E.2d at 236.

hand, if the beneficiary loses, the beneficiary forfeits all his or her interest under the trust."[88]

Specifically, the supreme court granted certiorari in *Slosberg v. Giller* to examine whether an *in terrorem* clause precluded a plaintiff's undue influence claim and resulted in the loss of benefits provided by the challenged trust's assets.[89] To decide this matter, the supreme court examined the relevant statutory and common law grounds.[90]

The supreme court decided that nothing in the relevant version of the Trust Code or elsewhere in the Georgia Code implies that the General Assembly intended to abolish the common law rule that a finding of undue influence invalidates a trust.[91] The English common laws "as they existed on May 14, 1776, remain in full force and effect," unless otherwise repealed, altered, supplanted, or ruled illegal or unconstitutional.[92] In *Giller v. Slosberg*, the appellate court's majority came to the "inescapable (but erroneous) conclusion"[93] that claims of undue influence are a matter of public policy and not legal doctrine.[94]

This blunder caused the court to erroneously rely on *Duncan v. Rawls*,[95] and the provision in O.C.G.A. § 53-4-68(a),[96] which states that "conditions in a will that are impossible, illegal, or against public policy shall be void."[97] In *Duncan*, the beneficiaries attempted a backdoor challenge to the trust so that they would not have to risk losing all their benefits if the trust was ultimately upheld as valid. The beneficiaries argued that their good faith and probable cause challenge should not result in trust asset forfeiture.[98] The court of appeals disagreed and refused to undermine the legislative branch's power to establish public policy by judicially creating a good faith/probable cause exception to *in terrorem* clauses in trust instruments.[99] Because the issue in *Duncan* was whether a good faith/probable cause exception existed, the court did not address whether an *in terrorem* clause precluded a challenge to the formation of a trust instrument.[100]

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88. *Id.*
89. *Id.* at 97, 876 S.E2d at 228.
90. *Id.*
91. *Id.* at 103, 876 S.E.2d at 238–39.
92. *Id.* at 96–97, 876 S.E.2d at 234; O.C.G.A. § 1-1-10(c)(1) (2023).
93. *Slosberg*, 314 Ga. at 103–04, 876 S.E.2d 228.
94. *Id.*
95. 345 Ga. App. 345, 812 S.E.2d 647 (2018).
96. O.C.G.A. § 53-4-68(a) (2023).
97. *Id.*
98. *Slosberg,* 314 Ga. at 105, 876 S.E.2d at 239–40.
99. *Id.*
100. *Id.* at 105, 876 S.E.2d at 240.

Conversely in *Giller*, the plaintiff successfully alleged the trust's formation was a product of undue influence, rendering the trust document and *in terrorem* clause invalid and unenforceable under Georgia law. [101] Employing the common law rule that a contract, will, or trust must be valid for its terms to be enforced, the court in *Giller* did not require a good faith/probable cause exception to determine that an invalid trust is synonymous to an invalid *in terrorem* clause.[102]

IV. COURT'S RATIONALE

A. Majority Analysis

The Supreme Court of Georgia reversed the Georgia Court of Appeals's decision and remanded the matter with two corrections.[103] First, the majority judgment highlighted that an *in terrorem* clause is not automatically valid because it fulfils former O.C.G.A. § 53-12-22(b),[104] which makes an *in terrorem* clause unconstitutional only if the trust instrument lacks a directive as to the disposal of the assets if the clause is violated. Although O.C.G.A. § 53-12-22(a)[105] includes only a single statutory requirement, the Georgia Trust Code integrates common law into its interpretation of legislation, unless otherwise indicated.[106] Thus, under Georgia law, two requirements must be satisfied for an *in terrorem* clause to be deemed legally enforceable.[107]

To begin, when the *in terrorem* clause has been violated, the trust instrument itself must provide instructions on how the property should be allocated.[108] Additionally, the trust instrument must be able to withstand judicial challenges in accordance with common law's guiding principles.[109] The elements necessary for the establishment of a lawful trust instrument are equivalent to those elements necessary for the formation of a legal contract.[110] Considering this, a trust instrument is invalid if it was established by fraud, duress, or undue influence. In its interpretation, the supreme court adhered to its time-honored practice,

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101. *Id.*

102. *Id.*

103. *Slosberg*, 324 Ga. at 108, 876 S.E.2d at 241-42.

104. Ga. S. Bill 128, Reg. Sess., 2009 Ga. Laws 101 (codified at O.C.G.A. § 53-12-22 (2023)).

105. O.C.G.A. § 53-12-22.

106. *Slosberg*, 314 Ga. at 103, 876 S.E.2d 228.

107. *Id.* at 99, 876 S.E.2d 236.

108. *Id.*

109. *Id.*

110. *Giller*, 359 Ga. App. at 877–78, 858 S.E.2d at 755.

which asserts that an invalid challenge to a legal instrument activates an *in terrorem* clause because the instrument is still alive, whereas a successful challenge puts an end to an *in terrorem* clause, thereby resulting in a legal instrument that is "stillborn."[111]

Second, the court found that the ruling in *Duncan* and the General Assembly's failure to change O.C.G.A. § 53-12-22(a) to resemble O.C.G.A. § 53-4-68(a)[112] improperly compelled the court of appeals to conclude that the beneficiary's initiation of legal proceedings triggered an *in terrorem* clause.[113] Specifically, following the *Duncan* decision, the General Assembly amended O.C.G.A. § 53-12-22 and O.C.G.A. § 53-4-68 subsections (b) and (c) to restrict conditions in a will that are contrary to public policy, but not O.C.G.A. § 53-12-22(a), which states that a trust may be established for any lawful purpose.[114] This shift in legislation, along with Duncan's refusal to judicially create a probable cause/good-faith exception, led the court of appeals to decide that an *in terrorem* clause was triggered when the beneficiary began legal proceedings.[115] The supreme court concluded that this inference is false.[116] Until otherwise stated or abolished, common law is in full effect, and common law permits an interested beneficiary to challenge the formation of a legal instrument, in accordance with O.C.G.A. § 1-1-10(c)(1).[117]

B. Concurrence

"I was wrong," Justice Bethel wrote at the beginning of his concurring opinion in *Giller*.[118] "At least I'm fairly sure I was."[119] In *Duncan*, the supreme court reviewed whether beneficiaries who unsuccessfully contested an *in terrorem* clause were entitled to a good faith/probable cause exception.[120] The court decided in *Duncan* that no good-faith and probable cause exception exists under Georgia law.[121] Justice Bethel said in his dissenting judgment in *Duncan* that barring the possibility of a good faith/probable cause exception would prevent challenges to trust

111. *Id.* at 878, 858 S.E.2d at 756.
112. O.C.G.A. § 53-4-68.
113. *Slosberg*, 314 Ga. at 106, 876 S.E.2d at 240.
114. *Id.* at 107–08, 876 S.E.2d at 241.
115. *Id.* at 97, 876 S.E.2d at 234.
116. *Id*. at 106–07, 876 S.E.2d at 241.
117. *Id.*
118. *Slosberg*, 314 Ga. at 108, 876 S.E.2d at 242 (Bethel, J., concurring).
119. *Id*.
120. *Duncan*, 345 Ga. App. at 348, 812 S.E.2d at 650.
121. *Id.* at 350, 812 S.E.2d at 651.

instruments that were improperly constructed.[122] Justice Bethel, seeing that a good faith/probable cause exception is not required to enable a challenge to the formation of a trust, enthusiastically agreed with the court in *Giller*'s explanation.[123] Recognizing the most important implication of the supreme court's decision in *Giller* is that summary judgment of a challenge to the construction of any legal document based only on the inclusion of an *in terrorem* phrase is incorrect.[124]

V. IMPLICATIONS

When faced with the choice, which comes first: a state's public policy or the unchecked pulse of a settlor's dead hand?[125] The Supreme Court of Georgia answered in *Giller*, that the unrestrained hands of a deceptive beneficiary certainly do not take precedent.

In his oral argument before the supreme court, Bobby Slosberg's counsel, Frederick Skip Sugarman, stated: "Trusts procured in the state of Georgia today with a literal gun to the settlor's head are immune to being challenged as long as the wrongdoer has the foresight to include an in terrorem clause in the instrument."[126] In a spectacular opening, Sugarman brought to light a legitimate gap in legislation in the state of Georgia. The amicus brief filed to oppose the appellate court's judgment noted that the preceding ruling proclaimed open season on any elderly person with uncertain capacity, fraudulent beneficiaries, and money in the bank. Georgia law upholds *in terrorem* clauses to protect the testator's or settlor's intent, although doing so may discourage meritorious challenges to an invalid legal document.[127] Because *in terrorem* clauses lead to forfeitures, it is imperative that the clauses be construed in a rigorous manner.[128] Consequently, a challenge to the valid composition of a trust instrument or will is a threshold issue that courts should address before evaluating whether the challenge produces a forfeiture in accordance with an *in terrorem* clause included in the instrument.[129]

The present standard in Georgia is that if it is proven that a trust was secured by undue influence, the whole trust, including all of its clauses,

122. *Id. at* 356, 812 S.E.2d at 656.

123. *Slosberg,* 314 Ga. at 108, 876 S.E.2d at 242.

124. *Id.* at 108–09, 876 S.E.2d at 242.

125. *In re Estate of Andrus,* 156 Misc. at 288.

126. Oral Argument at 2:30, Slosberg v. Giller, 314 Ga. 89, 876 S.E. 2d 228 (2022) (No. S21G1226).

127. No Contest Clause (GA), Practical Law Standard Clauses w-000-6419.

128. Callaway v. Willard, 321 Ga. App. 349, 353, 739 S.E.2d 533, 536 (2013).

129. *Slosberg*, 314 Ga. at 102 n.16, 876 S.E.2d at 238.

is defective and void. Significantly, the mere presence of an *in terrorem* clause in a legal document, such as a trust or will, does not, however, preclude a challenge to the document's validity.[130] Prior to the 2021 amendment of O.C.G.A § 53-12-22, this principle, though well established, was not expressly codified in Georgia law.[131] To that end, the door to "animate still born legal instruments" was widened just enough to force the appellate court to rule that an *in terrorem* claim precluded a beneficiary's challenge to the legality of a legal instrument.[132] Nonetheless, the *Giller* decision reaffirmed that not even a gun to a settlor's head could pry trust assets from a settlor's cold dead hands.

130. *Id.* at 100, 876 S.E.2d at 236.

131. *Id.* at 95–96, 876 S.E.2d at 233.

132. *Id.* at 93, 876 S.E.2d at 228.