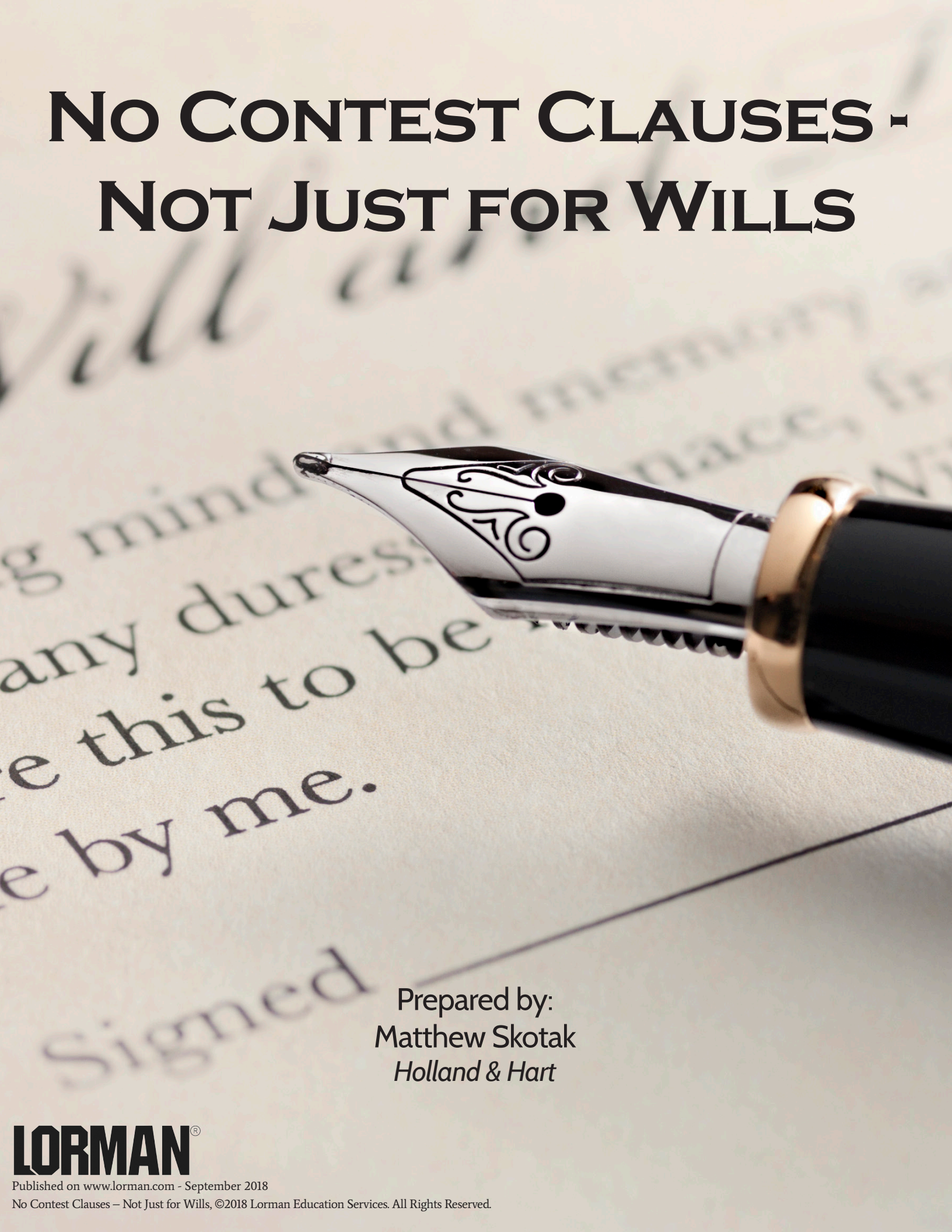
No Contest Clauses - Not Just for Wills



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Published on www.lorman.com - September 2018

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No Contest Clauses – Not Just for Wills

Written by Matthew Skotak

Fiduciary litigation continues to grow and often times outpaces the development of case law regarding the myriad of issues that arise in estate and trust disputes. Historically fiduciary litigation involved disputing family members or changes in family circumstances. However, another frequent source of litigation is the estate planning documents themselves. For this reason, estate planners often include a no contest clause, or *in terrorem* clause, in a will or trust as a means of deterring feuding beneficiaries from challenging the validity of the instrument; yet, enforcement of these no contest clauses carries its own burden.

A no contest clause is more frequently contained in a will, although it can also be prudent to include these provisions in trusts – especially when the underlying concern is to discourage litigation over the decedent's estate plan by disinheriting a person who unsuccessfully contests the will and/or trust. The enforceability of these provisions varies from state to state; however, Colorado has determined that a no contest clause is valid when the contesting party lacks probable cause to bring their challenge. *See Colo. Rev. Stat*. §§ 15-11-517, 15-12-905.

This definition creates a grey area that any potential will or trust contestant will need to thoroughly consider before bringing any challenge against an estate planning document. While some estate planners and contesting parties may believe that a no contest clause is

generally not enforced, the reality, however, is that no contest clauses are enforceable when there is no probable cause for bringing the will contest.

One of Colorado's leading cases on the subject, *In re Estate of Peppler*, states that "[w]hile no-contest clauses in wills are generally held to be valid and not violative of public policy, such clauses are to be strictly construed, and forfeiture is to be avoided if possible." *In re Estate of Peppler, 971 P.2d 694 (Colo. App. 1998).* Under *Peppler*, probable cause is defined as "the existence, **at the time of the initiation of the proceeding**, of evidence which would lead a reasonable person, properly informed and advised, to conclude that there is a substantial likelihood that the contest or attack will be successful." Colorado commentators have noted that whether the contesting party had a "substantial likelihood of success" is to be considered in light of the burden of proof and the elements of the claim. David M. Swank, *No-Contest Clauses: Issues for Drafting and Litigating*, 29 Colo. Law. 57. This means that in a challenge to the validity of a will, the contesting party has the ultimate burden to prove by a preponderance of the evidence that the challenged will, or trust, is invalid because of lack of testamentary capacity, undue influence, fraud, duress, mistake, or revocation. In determining whether the contesting party was "properly informed and advised", one factor for the court to consider is whether "the beneficiary relied upon the advice of disinterested counsel sought in good faith after full disclosure of the facts." Although "disinterested counsel" is not defined, Colorado commentators have also suggested that "disinterested counsel" does not include the contesting party's counsel for the will or trust contest because, if the advice of such counsel were sufficient, this factor would

be essentially meaningless as nearly every person bringing a contest would be able to meet this burden. *Id.*

Though the majority of law on this topic centers on the enforcement of a no contest clause in a will, by analogy, these provisions may also be deemed enforceable in disputes of trust documents. This office, for example, recently litigated a case in which no contest clauses were deemed to be valid and enforceable against a beneficiary who challenged the validity of both a will and a trust.

For these reasons, potential will and/or trust contestants should consider all of the facts, think carefully, and obtain legal advice from disinterested counsel before bringing a challenge to a will or trust instrument. Planners should also consider the implementation of a no contest clause in both a will and trust when counseling their estate planning clients though discussion of whether a challenge to the will, trust or overall estate plan is likely and what types of challenges may arise. Lastly, the enforcement of no contest clauses in either a will or trust may require a showing that the contesting party lacked probable cause for their challenge, failed to rely upon disinterested counsel and that the challenging party was properly informed and advised prior to bringing their challenge.

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