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Validity of No-Contest Clauses in Wills

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NOTES

Wills: Validity of No-Contest Clauses in Wills—Recently the Missouri Supreme Court was afforded an opportunity to reconsider the validity of "no-contest" clauses in wills. The case involved a will which provided:

> 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.

Testator's son, who was to receive only $100 under the will had commenced an action to contest the will, alleging that the testator was of unsound mind and was subjected to undue influence at the time he signed the will. The contest was settled by payment of $5,000 to the son from the assets of the estate.

Sometime later, when a trust established by the will was to terminate and the corpus thereof distributed, a question arose as to whether the children of testator's son were prevented from sharing in such distribution because of the son's violation of the "no-contest" clause.

The trustee petitioned for a declaratory judgment seeking construction of the "no-contest" clause and a determination of the persons to whom the corpus of the estate should be distributed. The lower court found that the son had probable cause for contesting the validity of the will but, in light of prior Missouri decisions upholding the validity of such clauses without regard to any probable-cause exception, decided that both the son and his children lost their rights under the will because of the son's contest.

On appeal the Missouri Supreme Court was asked to reconsider the doctrine set forth in its prior decisions and adopt the probable-cause exception. After reviewing its prior holdings and the authority in support of the probable-cause exception, it decided that the arguments in favor of the unconditional validity of this type of clause continued to preponderate.[1]

When the contest, as here, is on one of the six usual grounds, namely: forgery, subsequent revocation by later will or codicil, fraud, undue influence, testamentary incapacity, or improper execution, there is a definite conflict of authority on the effect to be given a "no-contest"

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[1] Commerce Trust Company v. Weed, 318 S.W. 2d 289 (Mo. 1958).

clause.[2] A court confronted with facts similar to those involved in this case would most probably be forced to adopt one of three lines of judicial decisions.[3] It could: declare that a "no-contest" condition is valid in every instance; adopt the doctrine that such a condition is valid and enforceable if the contest is merely frivolous and vexatious, but invalid and unenforceable where probable cause for contest is shown and the action was prosecuted in good faith; or simply declare that such a condition is unenforceable in every instance.[4]

The doctrine that a provision in a will for the forfeiture of the share of a beneficiary who contests the will is always valid and not contrary to public policy appears to have originated in the English case of *Cooke v. Turner*[5] and is now adopted by numerous jurisdictions.[6] The rea-

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[2] Although not contests within the strict meaning of the term of what can be grounds for contest of a will in probate proceedings (see ATKINSON, WILLS § 96 (2d ed. 1953)), when a contestant alleges that testator devised property which he did not own the courts have consistently held the "no-contest" condition valid. Again considering that the action is technically not a ground for contest unless specifically made so by testator, when the contestant has shown that testator has made specific dispositions in violation of an express statute or ruling of law, such as the Rule Against Perpetuities, the courts are equally consistent in declaring the condition invalid. See Browder, *Testamentary Conditions Against Contest,* 36 Mich. L. Rev. 1066, 1074, 1075 (1938).

[3] A fourth possibility which might be utilized in a small minority of jurisdictions would be the ancient "In Terrorem" doctrine, by which a condition subsequent providing for forfeiture in the event of contest, when imposed on a bequest of personal property, is regarded as "in terrorem" and void unless followed by a gift over on the breach thereof. This artificial doctrine, having its roots in 17th century English law, is not supported by any policy considerations and is presently used, if at all, partly because it is a convenient device for deciding a case without having to face the problem of public policy. Currently this archiac doctrine occasionally appears as a modification of the probable-cause rule to the effect that a "no-contest" condition will not be enforced if the contestant had probable cause, provided there is no gift over on breach of the condition. For a discussion of the origin and present status of this doctrine, see Browder, *supra* note 2, at 1092, 1100; and Browder, *Testamentary Conditions Against Contest Re-examined,* 49 Colum. L. Rev. 320, 338, 339 (1949); Wells v. Menn, 158 Fla. 228, 28 So. 2d 881 (1946).

[4] Claims of representing the majority are made by proponents of both the first and second views. C.J.S., *Wills* § 983 contends that the first view is majority. See 67 A.L.R. 52, 64 (1940) and 125 A.L.R. 1135, 1136 (1940) to the effect that the first view is minority and the probable-cause rule is majority. Note however, that ATKINSON, WILLS § 82 (2d ed. 1953) and PAGE, WILLS § 1306 (3d ed. 1941) do not commit themselves on which view is majority. Latest research indicates there is a fairly even division. Browder, *supra* note 3. It must also be noted that ruling cases in many jurisdictions holding with the claimed majority or minority were decided long ago and have not had their postion re-examined in the light of contemporary concepts of public policy. States that claim to adopt the more stringent first view often avoid its harsh effect in particular cases by way of construction to avoid finding a breach.

[5] 15 M. & W. 727, 153 Eng. Rep. 1044 (1846).

[6] Smithsonian Institution v. Meech, 169 U.S. 398 (1898); Donegan v. Wade, 70 Ala. 501 (1881); Estate of Hite, 155 Cal. 436, 101 Pac. 443 (1909); Cohen v. Reisman, 203 Ga. 684, 48 S.E. 2d 113 (1948); Hurley v. Blankenship, 267 S.W. 2d 99 (Ky. S. Ct. 1954); Rudd v. Searles, 262 Mass. 490, 160 N.E. 882 (1928); Schiffer v. Brenton, 247 Mich. 512, 226 N.W. 253 (1929); Rossi v. Davis, 345 Mo. 362, 133 S.W. 2d 363 (1939); Burtman v. Butman, 97 N.H.

sons for holding such a provision in a will valid without exception for probable-cause are based on an interpretation of public policy. Some courts hold that there is no public policy involved since the state has no interest in who possesses the property in question. As stated in this early case:

> . . . the state has no interest whatever apart from the interest of the parties themselves. There is no duty on the part of an heir, whether of perfect or imperfect obligation, to contest his ancestor's sanity. It matters not to the state whether the land is enjoyed by the heir or the devisee; and we conceive, therefore, that the law leaves the parties to make just what contracts and what arrangements they may think expedient as to the raising or not raising questions of law or fact among one another, the sole result of which is to give the enjoyment of property to one claimant rather than another.[7]

In answer to this argument that the state has no interest in whether the heir or the devisee enjoys the use of the land, Chancellor Wardlaw of South Carolina stated:

> It seems to me that this is a very narrow view of public policy. It is the interest of the state that every legal owner should enjoy his estate, and that no citizen should be obstructed by the risk of forfeiture from ascertaining his rights by the law of the land. It may be politic to encourage parties in the adjustment of doubtful rights by arbitration or by private settlement; but it is against the fundamental principles of justice and policy to inhibit a party from ascertaining his rights by appeal to the tribunals established by the state to settle and determine conflicting claims. If there be any such thing as public policy, it must embrace the right of a citizen to have his claims determined by law.[8]

In the later case of *Rudd v. Searles*[9] the Massachusetts court found that there was a public policy issue involved in enforcing this type of clause in that the state is definitely concerned with discouraging unmeritorious litigation.[10] The Massachusetts court reminds the contestant that such a condition does not deprive him of his right to have a judicial determination of his contest. Thus in its decision the court states:

> . . . the prohibition [against contesting] cannot be absolute, and can be invoked only where the validity of a will has been unsuc-

254, 85 A. 2d 892 (1952) *(semble)*; Alper v. Alper, 2 N.J. 105, 65 A. 2d 737 (1949); Bender v. Bateman, 33 Ohio App. 66, 168 N.E. 574 (1929); Whitmore v. Smith, 94 Okla. 90, 221 Pac. 775 (1923) (dictum); Massie v. Massie, 54 Tex. Civ. App. 617, 118 S.W. 219 (1909); Barry v. American Security and Trust Co., 135 F. 2d 470 (D.C. Cir. 1943); Womble v. Gunter, 198 Va. 522, 95 S.E. 2d 213 (1956); Elder v. Elder, 84 R.I. 13, 120 A. 2d 815 (1956). See also Comment, 45 Geo. L.J. 200 (1956-57); and Comment, 24 U. Chi. L. Rev. 762, 763 (1957).

[7] *Supra* note 5 at 1047.

[8] Mallet v. Smith, 27 S.C. Eq. (6 Rich) 12, 60 Am. Dec. 107, 109 (1853).

[9] Rudd v. Searles, *supra* note 6.

[10] Also see ATKINSON, *supra* note 2, at §82, page 409.

> cessfully contested. If there be a clear and patent defect in the formalities attending the execution of the instrument, or if the incapacity of the alleged testator be clear and notorious, the heirs or other parties interested will . . . contest the will, and, contesting it successfully, will set it aside with the clause of forfeiture. . . . Such a clause does not prevent a contest by the beneficiary under the will. . . . The beneficiary has the option, either to receive the gift under the will, or undertake a contest of the will. He can exercise his election.[11]

If the legatee chooses to contest and loses, he shows that his cause was unmeritorious[12] and he should be penalized in accordance with the will for wasting the court's time and the deceased's estate, such action being in derogation of what this court interprets to be the public policy.

The basis for the above interpretation of public policy by the courts may be that many will contests, being the result of dissatisfaction, have no foundation or are brought in the hope of securing a more favorable compromise settlement. When such an action is prosecuted, family dissension results and family secrets which should never be disclosed are made public. In interpreting public policy to impose a penalty on unmeritorious litigation in these cases, the courts are allowing the testator to freely dispose of his property in such a way as to prevent intra-family hostility after his decease without depriving a contestant of his right to a judicial determination of his claim. The evils which can result from unfounded litigation are cogently expounded in the following quotation:

> Public and private benefits may flow from the operation of such a clause. Contests over the allowance of wills, frequently, if not invariably, result in minute examination into the habits, manners, beliefs, conduct, idiosyncrasies, and all the essentially private and personal affairs of the testator, when he is not alive and cannot explain what may without explanation be given a sinister appearance. To most persons such exposure to publicity of their own personality is distasteful, if not abhorrent. The ease with which plausible contentions as to mental unsoundness may be supported by some evidence is also a factor which well may be in the mind of a testator in determining to insert such a clause in his will. Nothing in the law or in public policy . . . requires the denial of solace of that nature to one making a will. A will contest not infrequently engenders animosities and arouses hostilities among the kinsfolk of the testator, which may never be put to rest and which contribute to general unhappiness. Moreover, suspicions or beliefs in personal insanity, mental weakness, eccentricities, pernicious habits, other odd characteristics centering or radiating from the testator may bring his family into evil repute and ad-

[11] Rudd v .Searles, *supra* note 6, at 499; 160 N.E. at 886.

[12] It is important not to equate "unsuccessful contest" with "unmeritorious contest" in every case. Rules of evidence may, for example, prevent a person with a de facto meritorious cause from prevailing in a trial because the contest may be partially grounded on evidence inadmissable in court.

versely affect the standing in the community of its members. Thus a will contest may bring sorrow and suffering to many concerned.[13]

It is important to note that the Missouri Court in the instant case expressly relies on the reasoning of its prior decisions in *In Re Chambers' Estate*[14] and in *Rossi v. Davis*[15] wherein the above reasoning and quotations form a substantial basis for the results there reached. The Missouri Court recognizes "that the view that the forfeiture provisions should not be enforced where probable cause exists is supported by logical reason and respectable authority"[16] but prefers to rely on its reasoning in the *Chambers*[17] and *Rossi*[18] cases to enforce such a clause without regard to any such exception based upon the good faith and probable cause of the contestant.

Jurisdictions which recognize such an exception are numerous,[19] but whether the exception will be applied in the instant case may vary depending on whether the liberal view or the more restrictive Restatement position is adopted.

The majority of states recognizing this exception adopt the liberal position and, like the states which believe such a condition should be enforced without exception, also base their decision on an interpretation of public policy. Thus the "no-contest" clause is declared to be contrary to public policy and inoperative when the contest was made in good faith and on probable clause, whether the contest was for fraud, undue influence, testamentary incapacity, improper execution, forgery, or subsequent revocation by a later will or codicil.

While supporters of the unconditional validity doctrine base their position on an absence of public policy or on the public policy favoring prevention of unmeritorious litigation, advocates of the probable-cause

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[13] Rudd v. Searles, *supra* note 6, at 499; 160 N.E. at 886.
[14] 332 Mo. 1086, 18 S.W. 2d 30, 67 A.L.R. 41 (1929).
[15] Rossi v. Davis, *supra* note 6.
[16] *Supra* note 1, at 289, 301.
[17] *In re* Estate of Chambers, *supra* note 14.
[18] Rossi v. Davis, *supra* note 6 .
[19] South Norwalk Trust Co. v. St. John, 92 Conn. 168, 101 Atl. 961 (1917); Wells v. Menn, *supra* note 3 *(semble); In re* Estate of Cocklin, 236 Iowa 98, 17 N.W. 2d 129 (1945); Wright v. Cummings, 108 Kan. 667, 196 Pac. 246 (1921) (dictum); *In re* Estate of Hartz, 247 Minn. 362, 77 N.W. 2d 169 (1956); *In re* Smyth's Estate, 271 N.Y. 623, 3 N.E. 2d 453 (1936); Ryan v. Wachovia Bank and Trust Co., 235 N.C. 585, 70 S.E. 2d 853 (1952); Wadsworth v. Brigham, 125 Ore. 428, 259 Pac. 299 (1928), *aff'd on rehearing:* 125 Ore. 458, 266 Pac. 875 (1928); *In re* Friend's Estate, 209 Pa. 442, 58 Atl. 853 (1904); Rouse v. Branch, 91 S.C. 111, 74 S.E. 133 (1911); Tate v. Camp, 147 Tenn. 137, 245 S.W. 839 (1922); Estate of Chappel, 127 Wash. 638, 221 Pac. 336 (1923); Dutterer v. Logan, 103 W. Va. 216, 137 S.E. 1 (1927); Will of Keenan, 188 Wis. 163, 205 N.W. 1001 (1925); Calvery v. Calvery, 122 Tex. 204, 55 S.W. 2d 527 (1932); First Methodist Episcopal Church South v. Anderson, 110 S.W. 2d 1177 (Tex. Civ. App. 1932); Hodge v. Ellis, 268 S.W. 2d S 275 (Tex. Civ. App. 1954). See also 157 A.L.R. 596 (1945).

exception emphasize the public interest in preventing fraud and imposition in the making and probate of wills.

In every jurisdiction there are safeguards placed on the execution of a testator's will which usually require that he be competent, free from imposition by others, and that certain formal requirements be complied with. Insuring compliance with these safeguards, which were imposed by the people through their legislature, must, in the opinion of the states recognizing this exception, take precedence over testator's freedom to dispose of his property with whatever conditions that he desires. Admitting that no question of forfeiture arises until a beneficiary has contested the will and failed, thus demonstrating that the will was valid, and that there usually is no duty to contest, nevertheless a beneficiary cannot be certain of the strength of his or his opponent's case when factual issues predominate. To permit a threat of forfeiture to increase the ordinary risks of litigation based on probable cause would result in suppression of facts which the public, through its courts, should be aware of to prevent fraud and non-compliance with statutes.

The Connecticut Supreme Court supported this exception in the following language:

> Courts cannot know whether a will, good on its face, was made in conformity to statutory requirements, whether the testator was of sound mind, and whether the will was the product of undue influence, unless these matters are presented in court; and those only who have an interest in the will, will have the disposition to lay the facts before the court. If they are forced to remain silent, upon penalty or forfeiture of a legacy or devise given them by the will, the court will be prevented by the command of the testator from ascertaining the truth; and the devolution of property will be had in a manner against both statutory and common law. Courts exist to ascertain the truth and apply the law to it in any given situation; and a right of devolution which enables the testator to shut the door of truth and prevent observance of the law, is a mistaken public policy.[20]

The Wisconsin Supreme Court in *Will of Keenan*,[21] after quoting the Wisconsin Constitution[22] which guarantees free and prompt legal remedies for recognized wrongs, asks the following questions: "Is it not against public policy to permit one person to deprive another from asserting his rights in court? And especially so before it is ascertained that the prohibition against contest is in fact that of the testator and not that of one exercising undue influence over him, or that he was mentally competent to make it?"[23] Some states answer these questions in the negative. Jurisdictions such as Wisconsin, which recognize the unqual-

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[20] South Norwalk Trust Co. v. St. John, *supra* note 19, at 175.
[21] Will of Keenan, *supra* note 19.
[22] Wis. Const. art. I, §9.
[23] Will of Keenan, *supra* note 19, at 176.

ified application of the probable-cause exception, answer affirmatively.[24] The jurisdictions which adopt the Restatement position give a qualified affirmative answer.

The American Law Institute has endorsed the probable-cause exception only in cases where contest is made on the ground of forgery or subsequent revocation by a later will or codicil,[25] or where a particular provision of the will is claimed to violate some express restriction on property disposition, such as the Rule Against Perpetuities, the rules against restraints on alienation, accumulations, restraints on marriage, or other conditions designed to influence conduct illegally, or a mortmain statute limiting dispositions to charitable institutions.[26] In cases involving a contest based on fraud, undue influence, improper execution, or lack of testamentary capacity the Institute contends that the balance of social policy is normally in favor of validity of the forfeiture clause since it prevents waste of the estate and reduces the possibility of besmirching testator's reputation in actions most easily premised upon issues involving uncertain states of fact. The Institute points out that the right to litigate remains with a dissatisfied devisee or legatee in all cases, but in the event of failure to prevail in these last four areas the forfeiture clause should be operative. It should be noted here that if the Restatement view were applied by the Missouri Court in this case the result would be identical since probable cause would be of no concern to the court in a contest founded on undue influence or testamentary incapacity.

However, when a contest based upon a claim of subsequent revocation is unsuccessfully prosecuted in good faith and on probable cause the public has an "interest in having all the documents believed to represent a decedent's disposition of his property presented to the court"[27] and the forfeiture should not be enforced. Similarly, because the public has an interest in discovering the crime of forgery, an unsuccessful contest on this ground would not cause a forfeiture under this rule. The Institute claims that contests on these two grounds are based upon evidence "far more definite in character than the shadowy lines of demarcation involved in mental capacity, undue influence or fraud"[28] and do not normally involve the reputation of the testator.

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[24] In Will of Keenan, *supra* note 19, the court also referred to the Wisconsin rule that the probate of a will is a proceeding *in rem* and involved a consideration of public welfare. The court stated that sound public policy dictated that the truth of a disputable claim shall be ascertained as the law provides; that since courts are instituted to administer justice in the state, there should be no penalty attached to the performance of that function and inquiry should not be prevented by penalties when there is probable cause to contest.

[25] RESTATEMENT, PROPERTY §428 (1944).

[26] *Id.* at §429 (2).

[27] *Id.* at §428, p. 2501.

[28] *Id.* at 2502.

The Restatement's piecemeal acceptance of the probable-cause concept is criticized by Olin L. Browder, Jr.[29] as follows:

> Although it may be a crime to forge a will, but not to coerce or defraud a testator into making one, and although there may be a duty to produce for probate anything believed to be a true will, but no duty to contest a testator's sanity, it does not follow that there is less public interest in preventing probate of a fraudulent will than a forged one, or of an insane man's will than one which he has revoked by a later will.[30]

Judge Miller, in his dissent in *Barry v. American Security and Trust Company*,[31] stated: "What real difference does it make whether a man cleverly imitates the signature of a testator or stands over him with a club and compels him to sign?"

Mr. Browder,[32] adverting to the Restatement's argument that proof of forgery is based on evidence of a more definite character than that used in proving fraud or undue influence, believes that such language is argument for, not against, enforcement of "no-contest" clauses in such case. As he states: ". . . the more definite the proof, the more rapidly can a contestant evaluate the merit of his case, and the less pressing is the need that, in the public interest, he be relieved from threat of forfeiture."[33]

Judge Miller's dissenting opinion[34] maintains that a person with sufficient funds to hire counsel and risk a contest is the one who is least likely to be dissuaded from contesting by threat or forfeiture. It is "the poor, the timid, the children, women, and incompetents", who will be restrained; those whose right to contest a will public policy should be most concerned in protecting.[35]

The Restatement's endorsement of the probable-cause rule for contests involving some express social restriction is almost universally accepted and appears sound since the issues involved are not primarily factual, but depend upon the application of intricate legal rules or variable social policies where the beneficiary should not be forced to bear the risk of correctly anticipating the ultimate legal determination.

Finally, there is the possibility that a court would declare such a condition invalid in every case, regardless of whether the contest was instituted in good faith and on probable cause. Indiana invalidates all conditions for forfeiture upon contest by statute.[36] The Wisconsin Supreme Court, after denying forfeiture because there was probable

[29] Browder, *Testamentary Conditions Against Contest Re-examined, supra* note 3.
[30] *Id.* at 330.
[31] *Supra* note 6.
[32] Browder, *Testamentary Conditions Against Contest Re-examined, supra* note 3.
[33] *Id.* at 330, 331.
[34] Barry v. American Security and Trust Co., *supra* note 6.
[35] *Id.* at 473.
[36] Ind. Stat. Ann., §6-602 (Burns 1953). Compare with N. Y. Dec. Estate Law §126 (1946).

cause for the contest, left open the possibility of declaring all such conditions to be contrary to public policy and invalid by expressly refusing to decide the issue of the validity of these conditions in cases where there is no probable cause for the contest.[37]

It is this writer's opinion that to so remove all effectiveness from "no-contest" conditions by statute or decision would be to create too great an incentive for dissatisfied heirs, or devisees and legatees under a prior will, to commence vexatious suits based on little or no credible evidence. However, at the other extreme, to declare such a condition to always be valid would stifle bona fide contests by greatly increasing the risks of litigation. Jurisdictions which enforce this type of condition without any probable-cause exception should consider the effect of such action if the condition were to become a standard clause in all wills. The Restatement position would seem to create an unwarranted and artificial distinction between the various grounds for contest. The liberal probable-cause doctrine appears to be the most satisfactory for a court to adopt if the court ". . . in applying the probable-cause rule is alert to exact full compliance with a testator's wishes from a contestant who can show no just cause for his contest, resolving all doubts in that matter against him."[38] Adoption of this doctrine allows the testator reasonable freedom to dispose of his property as he wishes,[39] provides safeguards against vexatious litigation, insures compliance with statutory provisions for testamentary documents, and does not unduly increase the risk of litigating a primarily factual matter when done in good faith and on probable cause.

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[37] Will of Keenan, *supra* note 19, at 179.

[38] Browder, *Testamentary Conditions Against Contest Re-examined, supra* note 3, at 331.

[39] Wisconsin, seemingly being a minority of one, takes the position that the right to make a will disposing of property upon death is a most important right [*In re* Szperka's Will, 254 Wis. 153, 157, 35 N.W. 2d 209, 210 (1948)], one which is absolute [Will of Ball, 153 Wis. 27, 31, 141 N.W. 8, 10 (1913)], sacred [(Will of Rice, 150 Wis. 401, 445, 446, 136 N.W. 956, 973, 137 N.W. 778 (1912)]; *In re* Mills, 250 Wis. 401, 27 N.W. 2d 375 (1947); *In re* Agg's Estate, 262 Wis. 181, 54 N.W. 2d 175 (1952)], inherent. (Will of Rice, *supra*); a "natural" right [Nunnemacher v. State, 129 Wis. 190, 108 N.W. 627, 9 L.R.A., N.S. 121, 9 Ann. Cas. 711 (1906)], subject only to reasonable regulation [*In re* Uihlein's Estate, 269 Wis. 170, 68 N.W. 2d 816 (1955)], not abrogation, by governmental action or judicial decision. It would seem that, in the light of the other limitations accepted as reasonable restraints on the right of a person to dispose of his property by will, the equitable aspect of the probable-cause rule, and the infrequency of litigation on this issue, the Wisconsin court would not regard the application of the probable-cause rule as an unreasonable restraint upon the "natural" right of persons to dispose of property by will.