Official Publication of the State Bar of California
Trusts and Estates Section

California Trusts and Estates Quarterly

Volume 10, Issue 3 • Fall 2004

Inside this Issue

NO CONTEST CLAUSES NEED TO BE REFORMED, NOT ABOLISHED‡

By Adam F. Streisand, Esq. and Albert G. Handelman, Esq.***

I. INTRODUCTION

On July 24, 2004 the Executive Committee of the California State Bar's Trusts and Estates Section, comprised of some the most accomplished and devoted trust and estate lawyers in the state, voted by a wide majority to approve proposed legislation that would abolish the enforceability of no contest clauses in California. The authors of this article dissented for the reasons discussed below and hope that the Legislature will decline to enact the proposed legislation. The authors offer instead a very simple solution to the problems that motivated the Executive Committee into action.

It has become commonplace for estate planners to include a no contest clause in a will or trust to stem the ever increasing tide of internecine warfare. A no contest clause is intended to deter beneficiaries—upon threat of disinheritance—from challenging a will, a trust or some other document constituting part of an individual's integrated estate plan, or any provision of any such document. A majority of states do not enforce no contest clauses.[1] But they have been valid and enforceable in California for more than 100 years because no contest clauses advance the important public policies of discouraging litigation and protecting testator intent.

So why would the most dedicated and influential group of trust and estate attorneys in the State seek to propose legislation that would eradicate more than a 100 years of law that seeks to reduce litigation and allow testators to dispose of their own money as they see fit? It is not that anyone hopes that there will be more litigation. There are three reasons that proponents of the proposed legislation offer to justify its enactment:

> (1) The enforcement of no contest clauses has lead to an onerous amount of litigation over what constitutes a contest in the first instance;
>
> (2) No contest clauses lead to the enforcement of wills and trusts that were the product of undue influence, fraud, or the testator's unsound mind; and
>
> (3) In order to make no contest clauses effective, testators have to provide some amount to persons they wish to disinherit who then have something to lose if they do in fact contest the will or trust.

Each of these attempts to justify repeal and abolition of no contest clauses is overstated for the reasons discussed below. Moreover, reforms proposed by the same Executive Committee and enacted only fairly recently have shown great promise and have simply not been given ample time. The system may be broken, but it is not beyond repair.

II. THE EVOLUTION OF NO CONTEST LITIGATION

It is clearly the case that litigation over the applicability and enforceability of no contest clauses has become all too commonplace, adding significant expense, time and uncertainty to the resolution of disputes over trusts and estates. In California, litigation over no contest clauses began by addressing their enforceability in general.[2] Once the validity of no contest clauses was established, the courts entered a new era of determining what acts constitute a contest in a particular situation.[3]

Because a no contest clause results in a forfeiture, courts must strictly construe the clause and seek to prevent it from extending beyond the testator's plain intent.[4] As courts struggled to resolve ambiguities and determine whether certain acts fell within the terms of a particular no contest clause, estate planners became increasingly more sophisticated in their use. Drafters began spelling out in detail actions the testator intended to deter by the threat of disinheritance.

III. PUBLIC POLICY LIMITS ON NO CONTEST CLAUSES

In recent years, courts have been asked to decide whether the increasingly detailed and far-reaching no contest clauses are too Draconian in their effect. In *Burch v. George*,[5] the Supreme Court affirmed the validity of a no contest clause that forced a surviving spouse to elect between making a claim against trust assets on community property grounds or accepting the benefits of her husband's trust. In *Estate of Ferber*,[6] however, the Court of Appeal held for the first time that no contest clauses can go too far as a matter of public policy.

James Ferber understood the agony of family conflict. When his father Oscar died, family hostilities broke out into open warfare. James Ferber was appointed executor of Oscar's will. It took seventeen years to settle the estate, and the battle had a devastating effect on James Ferber's health. When he asked his attorneys to prepare his own will,[7] he had one overriding goal: to prevent litigation and protect his executor from suffering a similar fate.

James Ferber instructed that his will include a no contest clause that would go as far as the law would allow and still remain enforceable. But neither the Legislature nor the courts had ever decided the outer boundaries of an enforceable no contest clause. Setting out on unchartered waters, James Ferber's attorneys crafted an expansive no contest clause that they believed also had appropriate limitations.

James Ferber died four months later. The will was admitted to probate and letters testamentary issued appointing Richard Ferber as executor. Richard Ferber was the primary beneficiary under the will, which also provided for Sandra Plumleigh in the amount of $250,000.

Nine years later, due to tax and liquidity issues, the estate was still open and had made no distributions. Frustrated, Plumleigh filed three separate applications under Probate Code § 21320. In 1989, the Legislature enacted Probate Code § 21305 (now Probate Code § 21320), which creates a so-called "safe harbor" procedure. Under § 21320, a beneficiary may apply for a declaratory ruling on whether a proposed action would violate a particular no contest clause (a "21320 application"). The beneficiary then knows in advance whether she will be disinherited if she chooses to proceed with her proposed action.

In her first 21320 application, Plumleigh asked whether James Ferber's no contest clause would disinherit her if she filed a proposed petition to remove Richard Ferber as executor. Paragraph 6.3(f) of the no contest clause specifically would disinherit any beneficiary who "unsuccessfully requests the removal of any person acting as an executor."

Nevertheless, the court ruled that Paragraph 6.3(f) violated California's public policy. Encouraged by the ruling, Plumleigh filed two more 21320 applications seeking to take actions that clearly would violate express provisions of the no contest clause. In each case, the court ruled that Plumleigh could file her petitions and—win, lose or draw—still receive the $250,000 provided for her under James Ferber's will. The no contest clause, said the court, violated public policy.

The Court of Appeal reversed, explaining, "James's intent could not have been clearer: He wanted the greatest deterrence against interference the law would allow."[8] The court had no trouble concluding that each of Plumleigh's proposed actions violated the terms of the no contest clause. But the court also held that as a matter of public policy no contest clauses may prohibit only "frivolous" as opposed to "nonfrivolous" or "successful" challenges to an executor's conduct.[9] Thus, the court opened the door for even more litigation over when no contest clauses go too far.

IV. PROBATE CODE § 21320 LITIGATION AND LEGISLATIVE ACTION

Along with the growing sophistication of estate planners in the use of complex no contest clauses, and *Ferber*'s conclusion that no contest clauses might violate public policy, came a flood of 21320 applications. In virtually all cases, beneficiaries filed applications under § 21320 before taking any action that might be construed as a contest.

In nearly every case, the applications were met with objections. Applications under Probate Code § 21320 are ordinarily decided without an evidentiary hearing, but the rulings are immediately appealable. Thus, it sometimes takes years before a beneficiary knows whether he or she can proceed with his or her proposed action on the merits.

The system was broken and cried out for reform. In response, effective January 1, 2001, the Legislature enacted Probate Code § 21305(a) which identifies particular actions that cannot constitute a contest, unless the testator indicates expressly in the instrument that he or she intends for such an action to constitute a contest. In § 21305(b), the Legislature specifically identifies particular actions that, as a matter of public policy, cannot result in a forfeiture under a no contest clause. By way of example, § 21305(b) protects beneficiaries for actions relating to the following:

- Petitions to modify or terminate a trust.
- Petitions to establish conservatorships.
- Challenges to the exercise of a fiduciary power.
- Petitions regarding the appointment or removal of a fiduciary.
- Pleadings regarding an accounting or report of a fiduciary.
- Petitions to interpret or reform an instrument.

Probate Code § 21305 is already reducing the number of 21320 applications, and even more importantly, the number of objections to those applications. The reason is that § 21305 provides clear guidance to beneficiaries that they may avail themselves of the most important rights under the Probate Code to protect their interests without fear of disinheritance.

The Legislature, however, opted to make Probate Code § 21305 apply only prospectively. In addition, as originally enacted, § 21305 was ambiguous as to when certain of its provisions would apply. The statute was amended in 2002 to correct that ambiguity, but the uncertainty slowed the progress of § 21305 in reducing litigation over the enforceability of no contest clauses. Even after the 2002 amendment, certain of the provisions of the statute apply only to instruments executed on or after January 1, 2001, and the remaining provisions apply only to instruments of decedents dying on or after January 1, 2001 (or in certain cases on or after January 1, 2003), and to documents becoming irrevocable on or after January 1, 2001 (or in certain cases on or after January 1, 2003).

There is simply no reasonable justification for the prospective application of this extremely important statute. But as a consequence, even though Probate Code § 21305 is beginning to show real signs of fixing what was undeniably a broken system, it is hamstrung by its own limitations. And those limitations are entirely the result of the confusing and unnecessary array of effective dates set forth in the statute. Indeed, the authors are aware of the following situations which resulted in litigation solely because of the effective dates provided in the current version of Probate Code § 21305:

- A wife died in 1989, at which time the bypass-type trust created with her share of assets under a joint revocable trust instrument became irrevocable. Her husband, as surviving spouse, held a power to change the successor trustees of every trust created under the instrument, including the "irrevocable" bypass-type trust.

The husband died in 2002. Beneficiaries—issue of wife—sought the removal of his chosen successor trustee (the woman he married after the decedent wife had died). The successor trustee responded that this was a challenge to a trust which had become irrevocable in 1989, despite the fact that the provisions regarding successor trustees were not fixed until the husband's death in 2002. In short, the parties litigated over the question of whether the husband's power to change successor trustees made at least that portion of the bypass-type trust irrevocable until after January 1, 2001. This dispute would never have arisen had Probate Code § 21305(b)(7)—providing that a pleading regarding the appointment or removal of a fiduciary can never violate a no contest clause as a matter of public policy—been made effective as to all instruments upon its enactment, rather than being limited in its applicability to instruments of decedents dying after January 1, 2001 and documents becoming irrevocable after January 1, 2001.[10]

- A husband and wife executed a trust agreement in 1994. That instrument contained a typical no contest clause, but it did not specifically refer to subsequent trust amendments. The agreement was amended in 1994, 1995, 2001 and 2002. After both husband and wife had died, a beneficiary sought to mount a direct contest of the 2001 amendment. That amendment neither added nor amended a no contest clause. Under Probate Code § 21305(a)(3), a no contest clause contained in a trust instrument executed on or after January 1, 2001, does not apply to "an instrument, contract, agreement, beneficiary designation, or other document, other than the instrument containing the no contest unless the no contest clause specifically states that it is applicable to such other documents." The implication is that such a rule would not control the applicability of the no contest clause contained in the 1994 trust agreement. But Probate Code § 21305(c) makes the provisions of Probate Code § 21305(a) inapplicable in cases involving trust amendments executed on or after January 1, 2001 which do not add a no contest clause to or amend a no contest clause of an instrument executed prior to January 1, 2001. While these provisions are confusing enough, they do not clearly address the applicability of the notion of an "integrated estate plan" as enunciated in *Burch v. George*[11] and *Genger v. Delsol*.[12] Thus, the parties litigated over both the confusing state of the law affecting trust amendments under the current version of Probate Code § 21305, and the continuing relevance of the rule applying a no contest clause to a decedent's "integrated estate plan" in a case where § 21305 may not provide an answer. All of this litigation would have been avoided had the rules in § 21305 regarding the application of a no contest clause to an instrument other than the one containing the clause been made applicable without regard to the date of any of the instruments being considered.

V. REPEAL IS FAR TOO SWEEPING AND UNNECESSARY

Because § 21305 by its terms cannot quickly eliminate all of the excessive litigation over 21320 applications, the Executive Committee concluded that the entire body of law enforcing no contest clauses should be repealed and abolished. Without a doubt, the repeal of the laws making no contest clauses enforceable will eliminate 21320 applications entirely. But it also will eliminate a testator's right to deter (or attempt to deter) litigation over his or her estate. The authors believe this will unnecessarily interfere with the goals and desires of many clients seeking professional assistance with their estate planning.

It is also true no doubt that a well-crafted no contest clause together with a gift of sufficient magnitude to the disgruntled beneficiary will deter some from challenging a will or trust that was in fact procured by undue influence or fraud. The following are equally true:

A. Even if the disgruntled beneficiary is provided with a gift of some magnitude, she will pursue her contest anyway in the hope of greater reward or simply on principle.

B. Some beneficiaries, with or without a no contest clause in effect, will choose not to challenge a will or trust, even one that was procured by undue influence or fraud, because the beneficiary chooses to avoid the emotional or financial burden of doing so.

C. Even after litigation, a court may conclude that the beneficiary has failed to carry her burden of proof where the will was in reality the product of undue influence or fraud.

Thus, as a reason to abolish no contest clauses entirely, the fact that some may be deterred from contesting improperly procured instruments cannot possibly be reason enough to overturn the twin policies of litigation avoidance and honoring testator intent.

Some also argue that there is something unsavory about having to advise a client to leave something of sufficient value to a beneficiary whom the testator wishes to disinherit as a way of ensuring that the no contest clause is efficacious. The authors contend that it is equally unsavory to have to pay off a disgruntled beneficiary who faces no deterrent and contests the will or trust, simply because litigation is expensive and fraught with risk. As much of a Hobson's Choice as this might seem, a policy that may encourage testators to plan ahead and avoid what may well be a far costlier alternative, one that will throw the rest of the family into chaos, seems preferable.

The authors further believe that the inclusion of language in the Executive Committee's proposal purporting to allow "conditional gifts" is a poorly-conceived sop which will either (a) effectively gut the rest of the proposal, or (b) lead to just as much litigation over the question of whether a "conditional gift" otherwise violates the provisions of the proposed legislation as is currently seen with regard to no contest clauses. Neither outcome furthers the stated goals of the Executive Committee in supporting the proposed legislation or effectively deals with the properly-perceived problems under the current statutory scheme.[13]

The proposed legislation does provide that the court "may" order attorney fees when a contest is prosecuted or opposed without reasonable cause. This is in reality no different than the current remedies available to all litigants under Code of Civil Procedure § 128.5. The fact is that courts rarely conclude that a litigant had no reasonable basis for prosecuting or defending an action and rarely award attorney fees on such grounds. In other words, the attorney fee provision of the proposed legislation is not a meaningful deterrent to litigation in connection with wills, trusts or related instruments.

Moreover, total repeal and abolition of the laws allowing enforceability of no contest clauses is simply unnecessary. The fact is that reform is working and, with only slight modification to Probate Code § 21305, can resolve most of the problems that motivated the Executive Committee's recent action. The modifications would amend § 21305 so that it becomes immediately effective as to all instruments no matter when they were executed, no matter when the testator dies and no matter when the instruments become irrevocable. This will dramatically decrease litigation over the enforceability of no contest clauses and allow the parties to proceed to the merits of their disputes. This is sensible reform that respects the principle that testators have some reasonable right to condition gifts of their own assets to avoid family feuds.

‡ *An earlier version of this article appeared in the Daily Journal on August 4, 2004 (copyright Daily Journal Corporation, 2004).*

* *Loeb & Loeb LLP, Los Angeles, California.*

** *California Trust & Estate Counselors LLP, Santa Rosa, California.*

ENDNOTES

1. A number of states have statutory schemes which can result in certain penalties being imposed upon an unsuccessful litigant in a will or trust contest.
2. *See, e.g., Estate of Hite* (1909) 155 Cal. 436.
3. *See, e.g., Estate of Watson* (1986) 177 Cal.App.3d 569 (allegation of oral agreement not to revoke will did not violate no contest clause); *Estate of Kazian* (1976) 59 Cal.App.3d 797 (claim that wife's will improperly characterized property as separate property violated no contest clause); *Estate of Black* (1984) 160 Cal.App.3d 582 (allegation of oral agreement for nonmarital support did not violate no contest clause); *Genger v. Delsol* (1997) 56 Cal.App.4th 1410 (challenge to stock purchase agreement violated no contest clause contained in decedent's revocable trust instrument).
4. Probate Code § 21304.
5. (1994) 7 Cal.4th 246.
6. (1998) 66 Cal.App.4th 244.
7. James Ferber engaged author Streisand's law firm for this purpose.
8. 66 Cal.App.4th at 250.
9. *Id.* at 254-255.
10. *See* Probate Code § 21305(d).
11. (1994) 7 Cal.4th 246.
12. (1997) 56 Cal.App.4th 1410.
13. The authors refer readers to the accompanying article by James B. MacDonald and Randolph B. Godshall for further development of the argument surrounding these concerns.