

## THE DEAD HAND WRITES — AND, HAVING WRIT, MOVES ON: THE INCREASING PREVALENCE OF NO CONTEST LITIGATION IN CALIFORNIA

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### I. INTRODUCTION

Human beings naturally seek to influence the behavior of close relatives and friends. These same human beings, often being propertied, also naturally expect that their loved ones will observe a simple request when receiving a substantial legacy: "Just don't fight with your brother (or "my accountant" or "your step-mother" or "my caregiver of three weeks") after I'm gone." Thus, the logic of encouraging "good" behavior, or discouraging "bad" behavior, seems irresistible to these beneficent, generous donors.

That rationale is the simple genesis of *in terrorem*, or "no contest," clauses in wills and trusts. Not only do "no contest" clauses often embody the legitimate intent of the donor, they are also seen as deterring litigation and making administration of estates less cumbersome, time-consuming and expensive.

At the same time, however, the law abhors forfeiture, and the legal system does not want to deter meritorious lawsuits. This tension has generated California's ever-developing and increasingly arcane world of "no contest" litigation. The balance of this article will explore California's efforts to reconcile these conflicting goals — efforts that all too often have resulted in the paradox of estate and trust administration becoming more cumbersome, more time-consuming and more costly.

A no contest clause is a provision in a testamentary instrument<sup>1</sup> that provides for a reduction or forfeiture of the gift to a beneficiary who takes an action forbidden by the instrument concerning the administration of the estate. In its pristine form, that action is usually a contest, directly challenging the validity of the instrument. Some jurisdictions bar enforcement of no contest clauses.<sup>2</sup> Many other states recognize the validity of no contest clauses, but limit their effect by excusing unsuccessful contests that are made in good faith or with probable cause.<sup>3</sup> Certain states also distinguish between the application of no contest clauses if

the contests are by minors or the minor's legal representative.<sup>4</sup> In such cases, the no contest clause is not given effect.

California is in the minority in its broad enforcement of no contest clauses. The application of California's rule over the years has led to a comprehensive, although complex, statutory scheme and a wealth of reported decisions. California enacted its current set of no contest statutes [then Probate Code §§ 21300-21307] in 1989, operative January 1, 1990, to reaffirm the validity of no contest clauses and to supplement and clarify then-existing case law. Symptomatic of the confusion in this area, these sections of the Probate Code have been amended on five different occasions in the less than fifteen years since their enactment.

Despite the volume of authority (or perhaps because of it), a noticeable lack of certainty exists as to whether a particular proposed action would constitute a "contest" of the instrument in question. This uncertainty and the resultant caution among practitioners has led to the increased use of the statutory mechanism under Probate Code § 21320. Parties can learn in advance whether they risk forfeiture under a particular no contest clause.<sup>5</sup> The declaratory relief available<sup>6</sup> is intended to provide beneficiaries with a "safe harbor" procedure. Unfortunately, this "safe harbor" has spawned a remarkable increase in probate proceedings addressing "no contest" disputes. The end result — an expensive, unpredictable process — is exactly what California sought to avoid when it first enacted its "no contest" scheme.

### II. SOME THOUGHTS FOR PLANNERS

Before delving into the world of no contest litigation, estate planning practitioners should consider how their judicious use of no contest clauses can deter litigation after their client has died, and conversely how their misuse of these tools can increase disputes among their client's survivors. Perhaps the most important concept for a practitioner to remember and to stress to the client is that a no contest clause is only effective against the beneficiaries named in the instrument. "Non-beneficiaries" under the instrument have nothing to lose by contesting the instrument. In fact, if a "non-beneficiary" attacks an instrument, the presence of a no contest clause applicable to all beneficiaries may limit the range of responses available to named beneficiaries in defending their interests.

If a person would take as a pretermitted spouse or child, a no contest clause will not prevent that person from asserting her or his statutory right to inherit. A testator can avoid this result by use of a disinheritance clause.

A no contest clause is intended to deter certain acts; therefore the potential forfeiture must be sufficiently severe to serve as a disincentive to its intended targets. The bequest to the potential challenger must be sufficiently substantial to make the challenge not worth the risk of forfeiting the bequest. In many situations, the same factors that cause a testator/settlor concern about the litigiousness of the possible challenger also cause the testator/settlor to be reluctant to make a bequest to the potential challenger large enough to make the no contest clause effective.

Other questions for the practitioner to consider regarding a no contest clause include the following:

- Is a no contest clause necessary? When it is unlikely that there will be a challenge to the dispositive plan in a trust or will, there may be no need to insert a no contest clause. Similarly, estate planning clients should be advised of the inhibiting consequences of a broad no contest clause. Do they really want to prevent their beneficiaries from having the ability to monitor their fiduciary's conduct and bring questionable activities to the attention of the court?
- Who should be penalized when a beneficiary challenges the instrument? One option is simply to penalize the contestant; another option is to penalize the contestant and his or her issue. If the beneficiary is kindred to the donor, anti-lapse statutes may apply and the beneficiary's issue may take in the beneficiary's place if the beneficiary is treated as predeceasing the donor. If that is not what the donor desires, the instrument should provide for an alternate disposition.
- Which beneficiaries worry the testator? If most of the beneficiaries are not viewed as potential "troublemakers," it appears unduly punitive to subject them to a universally applicable no contest clause. In fact, if the settlor is favoring one or more beneficiaries over others similarly situated and is concerned about the possible reaction of the disfavored beneficiary, a no contest clause applicable to all beneficiaries may have more drastic consequences for the favored beneficiaries. These persons may not be the intended focus of the forfeiture provision, but will have more to lose if the clause applies equally to them. In these situations, consideration should be given to drafting a no contest clause limited to the beneficiary who is likely to challenge the estate plan.
- What actions should trigger the no contest clause? The provisions describing the disfavored action should be tailored to each specific situation, clearly reflecting the donor's intentions regarding what actions should act as triggers for revoking the gifts to the beneficiary. Again, before including a broadly worded no contest clause in an estate planning instrument, an attorney should counsel the client on the possible adverse consequences of effectively dissuading all beneficiaries from exercising their right to access to the

probate court to control the excesses of fiduciaries and other beneficiaries.

### III. BASIC CONCEPTS

#### A. Determination of Donor's Intent

Intuitively, the applicability of any particular no contest clause should depend upon the decedent-donor's intent. In determining the donor's intent, California follows its general rule that the "intention of the transferor as expressed in the instrument controls the legal effect of the dispositions made in the instrument."<sup>7</sup> This rule, and its inherent limitation to intent "as expressed in the instrument" has been regularly recognized by the courts.<sup>8</sup> Counterintuitively, however, California law is quite liberal in admitting extrinsic evidence to determine the donor's intent.<sup>9</sup> The parol evidence rule also is often relied upon to provide for the admission of extrinsic evidence for issues regarding mistake or imperfection of the writing.<sup>10</sup>

In the landmark 1994 case of *Burch v. George*<sup>11</sup> the Supreme Court admonished that a no contest clause is to be strictly construed so as not to extend a forfeiture beyond "what was plainly the testator's intent." A practitioner may plausibly expect, therefore, that extrinsic evidence would be inadmissible to prove that an otherwise ambiguous no contest provision should be interpreted to impose a forfeiture. After all, if extrinsic evidence is needed, then how "plainly" was the testator's intent stated? This argument was rejected, over Justice Kennard's vigorous dissent, in *Burch v. George* itself. In consequence, extrinsic evidence is always potentially admissible in these actions and may be proffered by any party in a proceeding under the Probate Code, including a Probate Code § 21320 proceeding.

#### B. Public Policy Considerations In Applying No Contest Clauses

Independent of determining the decedent's intent are the overarching policy considerations that California law seeks to enforce. Two public policy considerations, which do battle each time the issue is raised, were concisely summarized by the California Supreme Court in *Burch v. George*:

No contest clauses are valid in California and are favored by the public policies of discouraging litigation and giving effect to the purposes expressed by the testator.... Because a no contest clause results in a forfeiture, however, a court is required to strictly construe it and may not extend it beyond what was plainly the testator's intent ...<sup>12</sup>

The conflict between favoring enforcement of no contest provisions as a means of discouraging litigation and strictly construing no contest provisions to avoid forfeitures is also directly reflected in the statutory scheme. Under Probate Code § 21303, a no contest clause generally is enforceable. Under Probate Code § 21304, a no contest clause "shall be strictly construed."

The juxtaposition of these conflicting policy considerations has often resulted in litigation. The relaxed standards for admissibility of extrinsic evidence, coupled with the concepts of the "forced election" and the "integrated estate plan" (both of which are discussed below), have expanded the scope of litigation in recent years by increasing the range of actions potentially subject to forfeiture provisions.

### C. Current Statutory Structure and Definitions

No contest clauses are governed by Probate Code §§ 21300-21322.13 These statutes are not intended as a complete codification of the law regarding no contest clauses and common law governs when these statutes do not apply.<sup>14</sup> These statutes apply regardless of any contrary provision in the instrument.<sup>15</sup>

Probate Code § 21300 defines the terms used in the statutory scheme:

"Contest" means any action identified in a "no contest clause" as a violation of the clause. The term includes both direct and indirect contests.<sup>16</sup>

"Direct contest" of an instrument means a pleading in a proceeding in any court alleging the invalidity of an instrument or one or more of its terms based on one or more of the following grounds: revocation, lack of capacity, fraud, misrepresentation, menace, duress, undue influence, mistake, lack of due execution, or forgery.<sup>17</sup>

"Indirect contest" means a pleading in a proceeding in any court that indirectly challenges the validity of an instrument or one or more of its terms based on any other ground not contained in subdivision (b) [definition of direct contest], and that does not contain any of those grounds.<sup>18</sup>

"No contest clause" means a provision in an otherwise valid instrument that, if enforced, would penalize a beneficiary if the beneficiary files a contest with the court.<sup>19</sup>

## IV. HISTORICAL DEVELOPMENT

### A. Case Law Prior to *Burch v. George*

The complexity of the current status of "no contest" law is best understood in light of the historical development of the law. Any overview of the case law is divided between the case law pre- and post- *Burch v. George*. As a matter of gross generalization, the early twentieth century cases were more likely to find a particular action as violating a no contest clause. The later cases, at least until *Burch v. George*, tended to find against forfeiture.

In one case a creditor's claim was filed for over \$500,000, an amount equaling nearly 75% of the decedent's estate. The claimant-beneficiary alleged that this sum was the reasonable value of the claimant's services to decedent's business. Even though the claim would deplete the estate the court held that the creditor's claim was not a contest.<sup>20</sup> The theory of this case appeared to have been that an action based on a "source of right independent of the will" regarding the disposition of the decedent's property would not be a contest.<sup>21</sup> Similarly, an action by the beneficiary to enforce a pre-existing agreement was held not to violate the no contest clause of the decedent's will.<sup>22</sup>

Cases involving the character of property were troublesome and inconsistent. Perhaps because of this history, this area has been a particularly hotly litigated topic in the arena of Probate Code § 21320 petitions under current law. In the year prior to *Burch v. George*, the Court of Appeal in *Estate of Richter* found that a petition to determine the character of property was not a will contest when the will did not specify the character of estate property.<sup>23</sup> In *Richter*, the court observed that the testator referred to "my estate" in general terms and thus he appeared to be referring to that property owned by him which he had a right to dispose of, unlike the situation where the testator declares that all the property is his separate property, clearly indicating a belief that he is disposing of the entire estate, thereby requiring an election (between taking under the will or asserting one's independent ownership interests). This decision appeared to be contrary to *Estate of Kazian*, a 1976 case, in which an action to determine ownership was held to be a contest because the will specifically declared that all property in which the decedent had an interest was her separate property.<sup>24</sup> Eight years after *Kazian*, however, the court found that a similar action was not a contest, because the decedent only expressed an intent to dispose of property he had the right to dispose of by will.<sup>25</sup> In a case that foreshadowed *Burch v. George*, an action by a wife to assert joint tenancy rights to an automobile and to obtain property through spousal set-aside was held not to violate the no contest clause of the husband's will.<sup>26</sup>

