

# California

## Trusts and Estates Quarterly

Volume 11, Issue 4 • Winter 2005

### Inside this Issue

▶ By Margaret M. Hand

#### **Making the Other Guys Pay: Attorney Fees and the Common Fund Theory . . . . .6**

Fight back against the injustice of paying attorneys' fees when it is your adversary who caused harm to the estate or filed the frivolous action. The author explains how to overcome the American Rule that each side bears its own fees.

▶ By Shirley L. Kovar and John A. Hartog

#### **Can You Hear Me Now? Drafting a No Contest Clause under the New Rules . . . . .12**

Having deconstructed the illusion of a logical body of law on the enforceability of no contest clauses in our last edition, and decrying that system under which we currently find ourselves laboring, the authors now advise and educate on how to draft those clauses in this legal minefield.

▶ By Terrence M. Franklin and Matthew W. McMurtrey

#### **What Is a Care Custodian Under Probate Code § 21350? . . . . .18**

The Districts of the Court of Appeal are split and the Supreme Court has granted review. A primer on this important debate and critical analysis for reaching resolution and a sensible path.

▶ By Warren A. Sinsheimer

#### **In This Lawyer's Opinion: A T&E Lawyer's Role in Protecting the Vulnerable Client . . . . .23**

This provocative piece bites into the nape of the controversy over an attorney's obligation to maintain sacrosanct her client's confidences while feeling compelled to help and protect the client who becomes vulnerable because of age or infirmity.

▶ By Carmen A. Alberio

#### **Private Real Property Sales in Probate Proceedings—Let the Seller Beware . . . . .26**

Everything you need to know but were afraid to ask, or simply failed to find in pulling the pieces together from the Probate Code, Rules of Court and local rules, to ensure a successful probate sale of real property the first time around.

#### **Heard from the Court . . . . .31**

Reprising the popular column in which our prestigious probate judges share invaluable advice for success in their courtrooms, the Quarterly brings you straight talk from the Hon. Marjorie Laird Carter and the Hon. Richard G. Cline.

<b>From the Chair . . . . .</b>	<b>.2</b>
<b>From the Editor . . . . .</b>	<b>.3</b>
<b>Incapacity Alert . . . . .</b>	<b>.33</b>

<b>Tax Alert . . . . .</b>	<b>.36</b>
<b>County Recorder Alert . . . . .</b>	<b>.42</b>
<b>Litigation Alert . . . . .</b>	<b>.49</b>

© 2005 State Bar of California,  
Trusts and Estates Section

The statements and opinions herein are those of the contributors and not necessarily those of the State Bar of California, the Trusts and Estates Section, or any government body.

**CAN YOU HEAR ME NOW? DRAFTING A NO CONTEST CLAUSE UNDER THE NEW RULES**

By Shirley L. Kovar\* and John A. Hartog\*\*

**I. INTRODUCTION**

Recent developments in California case law and statutes have exposed the weaknesses of both the “generic no contest clause” (i.e., one size fits all) and “kitchen sink drafting” (i.e., wholesale inclusion of all conceivable beneficiary petitions or claims).

For example, *Burch v. George*<sup>1</sup> and *Genger v. Delso*<sup>2</sup> illustrate “the integrated estate plan.” In those cases the court examined the testator’s intent to determine whether the contest of a separate document that is an “integral part” of the estate plan should be included within the ambit of the no contest clause contained within the testamentary document. Other cases have explored the testator’s intent to trigger a “contest” upon the beneficiary’s filing of a petition to characterize the character or ownership of property.<sup>3</sup> The legislative response to the judicial expansion of a “one size fits all” approach was Probate Code § 21305(a),<sup>4</sup> which makes the generic no contest clause obsolete, meaning “ineffective,” to trigger a “contest” in three identified circumstances.<sup>5</sup>

*Estate of Ferber*<sup>6</sup> demonstrates the difficulties that can be created by “kitchen sink drafting.” The expansiveness of the *Ferber* clause led to a series of § 21320 petitions. The court of appeal limited the application of the clause on public policy grounds. The legislative response to *Ferber*’s “kitchen sink drafting” was § 21305(b), which identifies certain types of petitions that cannot trigger a no contest clause based on public policy.

More recently, the courts have attempted to discern the testator’s intent regarding whether a gift of assets included in a Decedent’s Trust will be forfeited as a result of a contest of an amendment to a Survivor’s Trust.<sup>7</sup> The authors have also learned that certain trial courts have considered the argument that a contest by a child will apply to the independent gifts made to the child’s children (i.e., the decedent’s grandchildren) when the no contest clause includes “issue of the beneficiary,” even when the grandchildren have not contested the instrument.

Neither § 21305(a) nor § 21305(b) has reduced the volume of § 21320 petitions filed to determine whether any particular beneficiary petition is a “contest.” The State Bar Executive Committee, reflecting the frustration of lawyers advising beneficiaries who feel unable to predict with confidence the reach of any no contest clause, have proposed to the Legislature a repeal of the enforceability of the no contest clause. The proposal was based on the belief that the presumed benefits of a no contest clause to carry out the intent of the testator and to deter litigation have

become overwhelmed by two factors that are directly related to the public policy that favors the enforceability of a no contest clause. First, the explosion of § 21320 litigation directly counters the proclaimed purpose of the no contest clause to deter litigation. Second, based on anecdotal evidence, many direct contests may be legitimate attempts to carry out the intent of a testator. This observation is supported by § 21350(6), which invalidates a bequest to a “care custodian of a dependent adult who is the transferor” unless there is a valid Certificate of Independent Review or clear and convincing evidence of the genuineness of the donative transfer.

The public policy underlying the Section’s proposal is to allow beneficiary petitions to be heard on their merits and to eliminate unnecessary § 21320 proceedings. That question is now before The California Law Revision Commission (“CLRC”) for study. The CLRC has not announced a deadline for the results of its study.

A goal of this article is to stimulate discussion regarding current drafting of the no contest clause. The authors’ suggested approach to drafting is premised on the following:

1. The no contest clause should distinguish between a “direct contest” and other types of contests. A direct contest is what most testators have in mind when asked if they want a no contest clause. In addition, a direct contest should be easy to identify, and there is little risk that a beneficiary would file a direct contest without realizing such action would trigger the no contest clause.
2. The “generic no contest clause” is not a good starting point for at least four reasons:
  - (a) It does not distinguish between a direct contest and other types of contests;
  - (b) It does not identify subtrusts by name;
  - (c) It does not specify what document when, if contested, will trigger the no contest clause; and
  - (d) It does not adequately tie the “contest” to the assets that are forfeited by an unsuccessful contest.

**II. EFFECTIVE DATES**

Practitioners need to remember the impact of effective dates on § 21305(a). The authors understand the effective dates of § 21305 to operate as follows:

- A pre-2001 Trust Agreement does **not** contain a no contest clause. An amendment to that agreement **ADDS** a no contest clause. Result: § 21305(a) **applies** to the no contest clause.
- A pre-2001 Trust Agreement **does** contain a no contest clause. An amendment to that agreement executed on or after January 1, 2001 **AMENDS** the no contest clause. Result: § 21305(a) **applies** to the no contest clause, as amended.