



How to Discuss the Dreaded No Contest Clause

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discussion

about the **DREADED No Contest Clause**

Is a trustee on solid ground to inform a beneficiary objecting to a trust that they receive nothing because the objection triggers a “no contest” clause?

The No Contest Clause is a two-sided coin. On one side of the coin, parents want to make certain their plans of distributing assets amongst their children and others are followed after their passing with enforcement of their wishes by a punitive risk of loss by objecting beneficiaries. On the flip side of that coin, beneficiary children may have concerns about losing their inheritance by triggering the “no contest” clause when their parents’ wishes or the allocation of assets are not acceptable.

why use a

“No Contest” Clause

The California well-established public policy for enforcing no contest clauses is to discourage litigation and give effect to the expressed intent of the testator (the person making their post-death distribution plans). In other words, persons creating a will and/or trust want to make certain their instructions are followed, complying with, and honored. The process and decisions going into a will and trust are very personal decisions and can be more complicated and complex than simply all beneficiaries receiving the assets in equal shares. The use of a no contest clause and the California Probate Codes are designed to give effect to those decisions.

what is a

“No Contest” Clause

A no contest clause is a tool in estate planning what is designed to discourage challenges or contests to one’s will or trust. The judicial application of no contest clauses are controlled by statutes in the California Probate Code.

California Probate Code Section 21311 (enacted in 2010), provides, in part, that a no contest clause shall only be enforced against a “direct contest” that is brought without “probable cause.” The phrases “direct contest” and “probable cause” are legal terms of art with specific meanings beyond their plain meaning. For instance, probable cause “exists if, at the time of filing a contest, the facts known to the contestant would cause a reasonable person to believe that there is a reasonable likelihood that the requested relief will be granted after an opportunity for further investigation or discovery.”

This means that the no contest clause will be triggered only when there is an absence of “probable cause” in the direct will or trust context. Probable cause is a low standard designed to protect an objector’s right to assert arguable legal claims. The term “reasonable likelihood” has been interpreted as more than merely possible, but less than “more probable than not.” Overall, this elements means that if the attorney bringing the trust contest believes they will win, the “probable cause” element is satisfied and the no contest clause would not cause a loss of all inheritance under the contested will or trust. Note this simple explanation explains why will and trust contests are common. Objectors often believe they have little to lose by a will or trust contest.

Conversely, California Probate Code Section 21311 (a)(2) and (3) still provides that when testators or settlors expressly state in the no contest clause that beneficiaries will be disinherited if they file a creditor’s claim or challenge a transfer of trust property on the grounds that they own the property, probable cause will not protect the beneficiaries. In addition to just will and trusts, other beneficiary challenges such as a beneficiary’s objection to a trust accounting could trigger the no context clause forfeiture.

best practices for an enforceable “No Contest” Clause

To make certain the trustee has financial resources to defend an attack on a testamentary instrument like will or trust, a properly drafted no contest clause will include a sentence permitting the trustee to use trust assets for defense against trust contest, or a similar version in a will.

Under the California no contest statutes, drafting attorneys should make certain that the no contest clause clearly states their client’s intent that an attack on a person’s distributive scheme (which includes the pre-nuptial agreement) could and would trigger disinheritance by enforcement of the no contest clause.

Whether a particular proceeding constitutes a contest under a given document depends on (i) the scope of the no contest clause, (ii) the circumstances of the particular case, and (iii) the language of the instrument. A proceeding which would constitute a contest under one will would be permissible under another.

Further, a no contest clause needs to be restated in each amendment or restatement of the original instruments with that clause, for the no contest clause to be applicable to challenges to any version of the estate plan.

final comments on

No Contest Clauses

A beneficiary can be faced with a hard decision – take the less-than-desired gift from a will or trust, or risk it all and go “double-or-nothing” by a will or trust contest. When the beneficiary is not adequately motivated (not enough money passing by the will or trust), the “double-or-nothing” gamble will look alluring. In other words, where a beneficiary is completely disinherited, they lose nothing by contesting the will or trust. Trustees are well advised to engage legal counsel to help them defend the Trust and respect the testamentary intent of the settlors.

about the author



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Denise Chambliss, Chair of Hoge Fenton's Trust and Estate Litigation group and a member of the Estates & Trusts and Litigation & Dispute Resolution practice groups, is based primarily in the firm's Tri-Valley office. Denise was named a "Northern California Super Lawyer" for 2015, 2016, and for 2017, as chosen by her peers and through the independent research of Law & Politics and San Francisco Magazine.

Denise is an experienced trial lawyer who maintains a general civil and business trial practice, with a focus on trust and estate litigation representing individual and corporate trustees, as well as executors and beneficiaries. She has had numerous successful trials as well as many successful mediations on behalf of her clients in cases. In trust and estate matters, Denise has extensive experience in cases involving demand for trust accounting, trustee mismanagement, breach of fiduciary duties, removal of trustees, surcharge claims, and challenges to estate planning documents based on lack of capacity or undue influence. In her business civil litigation practice, she handles contract disputes, business fraud and tort claims, corporate and partnership disputes, unfair competition and trade secret misappropriation claims, and commercial real estate disputes, including those arising out of broker-agent relationships, commercial leasing, and construction defects.

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