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Best in Law: The Pros and Cons of the No-Contest Clause

Trusts and Wills

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No-contest clauses are generally included in trusts and wills in California in an attempt to prevent challenges to an estate plan after death.

A no-contest clause looks like a powerful deterrent to any beneficiary considering contesting an estate plan. As an example, a child is left an entire trust estate, but the trust is later changed as a result of undue influence to leave 75 percent to a friend of the trustor. The child's recourse would be to contest the trust. The child may, however, be afraid to bring a legitimate contest where the trust's no-contest clause states it disinherits anyone bringing such a contest.

However, no-contest clauses are not as all-encompassing as they may at first appear and the reach of a no-contest clause may actually be quite limited.

Probable cause

No-contest clauses generally contain language providing for complete disinheritance of any beneficiary that brings a direct contest to a will or trust — such as a lawsuit seeking to invalidate part or all of a will or trust — without having probable cause for the challenge.

A no-contest clause will not be enforced, however, if the contest is brought with probable cause. Probable cause exists where, at the time the contest is filed with the court, the facts that are known to the contestant would cause a reasonable person to believe that there is a reasonable likelihood that they will prevail after further investigation or discovery.

If a person brings a direct contest in good faith, with a legitimate legal and factual basis, then even if they eventually lose the case it will not trigger enforcement of a no-contest clause.

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A beneficiary of a will or trust should, however, be careful of two types of claims for which probable cause is not a defense to enforcement: creditor's claims and a pleading challenging the transfer of property belonging to the estate on the grounds that it was not the property of the transferor.

Creditor's claims

A beneficiary owed money by the estate has a right to pursue a creditor's claim for payment. However, a no-contest clause may specifically state that bringing such a claim triggers the no-contest clause and disinheritance. The beneficiary is thus forced to choose between a claim and inheritance. Simply filing a short creditor's claim form may trigger the no-contest clause, so it is important to evaluate this situation carefully.

Transfer of property

No-contest clauses may also be enforced where a beneficiary challenges the transfer of property belonging to the estate by claiming that property transferred did not belong to the transferor. For example, spouses may have complicated community property issues. These issues may be avoided by making a generous gift in the estate plan to the spouse, and then forcing the surviving spouse to choose between pursuing a community property claim at the expense of being disinherited, or choosing to simply accept the bequest. This prevents the surviving spouse from getting more from the estate than intended.

Because there are only a few types of actions that can trigger them, no-contest clauses are not as powerful as they may at first appear. Care should be taken in evaluating whether to pursue contests or claims against an estate, but one should not be discouraged at the outset simply because there is a no-contest clause. Most likely, the no-contest clause will be no problem.

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