

**ELIMINATING THE FEAR FROM *IN TERROREM*:
RETHINKING NO CONTEST CLAUSES UNDER THE NEW LAW**

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I. INTRODUCTION

In construing and enforcing no contest clauses, courts balance two separate and conflicting legal principles. The first is the right of each testator to dispose of his or her property as he or she sees fit. The avoidance of family litigation, with its attendant risk of family enmity, divisiveness and airing of dirty laundry is a laudable goal, and most all jurisdictions, consequently, support a testator's conditioning of the privilege of inheriting assets on adhering to a no contest clause.

The second principle, in direct conflict with the first, is the right of interested parties to petition courts in a search for justice and truth. Was a will or trust the product of undue influence, fraud or mistake? Is there a question as to the valid interpretation of certain language in the instrument? Has the named fiduciary, in fact, not carried out the testator's wishes, or not acted in the best interests of the estate?

The Legislature's enactment of Senate Bill 1264 will materially change the application of no contest clauses. Current Probate Code sections 21300- 21322 are repealed, and will be replaced with new Sections 21310- 21315. The new law stems from an earlier proposal of the Executive Committee of the Trusts and Estates Section of the State Bar ("TEXCOM"). TEXCOM believed that existing law enforcing no contest

clauses was too complex and uncertain. The California Law Revision Commission (“CLRC”) after more than two years of study issued a legislative recommendation that served as the basis for Senate Bill 1264.

II. APPLICABILITY OF THE NEW LAW

A. Operative Date

1. The new law does not become operative until January 2010, when it will apply “to any instrument, whenever executed, that became irrevocable on or after January 1, 2001.” The delayed effective date is to provide a grace period to allow testators to have the opportunity to revise their instruments.

2. The combination of delayed effective date and retroactive application imposes upon estate planning attorneys the need to consider both the new law and the current law when they draft no contest clauses in 2009. No contest clauses drafted today will be governed by the new law when it becomes effective. Nevertheless, current law will apply to decedents dying in 2009.

B. Retroactivity

1. The new law applies to any instrument, whenever executed that became irrevocable after January 1, 2001. It does not apply to an instrument that became irrevocable before that date.

2. As a result, a single instrument may be subject to differing rules. A married couple’s trust that divided before 2001 into a (revocable) survivor’s trust and (an irrevocable) bypass trust could possess a no contest clause that would be subject to both

the old law and the new law. The trust's single no contest clause could be governed by both the new and the old law.

C. Repeal

1. The new law also repeals the provisions that currently govern instruments that became irrevocable before 2001.

2. For example, current Section 21305 will cease to be part of the law. The statutory safe harbors contained in section 21305 apparently will cease to exist.

3. For instruments that became irrevocable before 2001, practitioners may need to look (in an archive copy of the Probate Code) to repealed Sections 21300 through 21321, except for repealed Section 21302. These "repealed" sections may continue to govern no contest law for the wills of decedents who died before 2001 and for trusts that were irrevocable before 2001.

III. ENFORCEABILITY OF NO CONTEST CLAUSES UNDER THE NEW LAW

A. Limitations

The new law limits the enforcement of no contest clauses to only the following three types of contests:

1. "Direct contests of protected instruments" brought without probable cause;

2. Pleadings challenging "a transfer of property on the grounds that it was not the transferor's property at the time of the transfer;" and

3. Creditor's claims, or actions based on a creditor's claims.

B. Direct Contests of Protected Instruments

1. *Definition of Direct Contest*

A “direct contest” is one “that alleges the invalidity of a protected instrument or one or more of its terms,” based on one or more of the following grounds:

- ❖ Forgery;
- ❖ Lack of due execution;
- ❖ Lack of capacity;
- ❖ Menace, duress, fraud, or undue influence;
- ❖ Revocation of a will pursuant to Section 6120;
- ❖ Revocation of a trust pursuant to Section 15401; or
- ❖ Revocation of an instrument other than a will or trust pursuant to the procedure for revocation that is provided by statute or by the instrument; or
- ❖ Disqualification of a beneficiary under Probate Code Sections 6112 or 21350.

2. *Test for Probable Cause*

“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 and discovery.”

3. *Protected Instruments*

A “protected instrument” is an the instrument that contains the no contest clause or “[a]n instrument that is *in existence* on the date that the instrument containing the no contest clause is executed and is *expressly identified* in the no contest clause, either individually or as part of an *identifiable class of instruments*, as being governed by the no contest clause.”

C. What is “An Identifiable Class of Instruments”?

Assume that the client has a SEP IRA, a regular IRA, a Roth IRA, a life insurance policy, an annuity, and a transfer on death account. The client signs a trust with a no contest clause. If the no contest clause states that it applies to “all beneficiary designations,” has the no contest clause expressly identified “an identifiable class of instrument”? An instrument that identifies “all beneficiary designations in my life insurance policies,” “all beneficiary designations in my IRA accounts,” or “all beneficiary designations in my accounts with Charles Schwab” may satisfy the requirement that the class of instruments be “identifiable.”

D. Later Documents

Under the new law, however, since a no contest clause cannot apply to an instrument that is not yet in existence, a trust’s no contest clause cannot protect a subsequent beneficiary designation, or amendment to an existing beneficiary designation, or an amendment to a trust or similar instrument, or to a codicil to a will.

IV. PROPERTY OWNERSHIP DISPUTES

A. New Law

Under current Section 21305(a)(2), an action to “determine the character, title, or ownership of property” is a contest if expressly identified in the no contest clause. Under new Section 21311(a)(2), “[a] pleading to challenge a transfer of property on the grounds that it was not the transferor’s property at the time of the transfer” is a contest “if the no contest clause expressly provides that application.”

B. Spousal Disputes

1. The most likely fact pattern for post-death disputes concerning property ownership usually arises between the surviving spouse and the decedent’s personal representation. A testator typically seeks to avoid post-death disputes between the survivor and the children-beneficiaries, and intends that a no contest clause will avoid post-death “divorce disputes”.

2. The testator often accomplishes this objective by putting the survivor to an election. That election requires the spouse to choose “between taking the distribution provided... under the trust, or alternately, renouncing that distribution and taking against the trust estate pursuant to her independent legal rights.”

3. The new statute permits the testator to impose an unconditional penalty on the survivor who initiates such actions because it does not contain the probable cause limitation applicable to direct contests.

4. This provision may pose a serious quandary for the drafter: when representing both spouses in a subsequent marriage. Whose ox will be gored by

the inclusion or exclusion of this provision? Similarly, should the drafter soften the burden of the statute by including a probable cause limitation? When representing married couples who have no pre-marital or marital settlement agreements, this particular issue may become an ethical morass.

5. The planner's individual bias will also come into play. When the spouses' community property rights are indeterminate, should the survivor be permitted to pursue a good faith claim, e.g. probable cause; or should the decedent's plan be protected to the maximum extent, e.g. no inclusion of a probable cause exception? Recall that absent inclusion of a drafter-provided probable cause exception, it is not available as a defense to enforcement of a no contest clause under the statute. Similar considerations should apply when representing registered domestic partners.

C. Other Property Disputes

New Section 21311(a)(2) is not limited to spousal forced elections; it applies to any pleading that challenges a gift "on the grounds that it was not the transferor's property at the time of transfer." Under the new law, forfeiture can still be imposed when children challenge their parents' characterization of property. Similarly, whether a claim by an unregistered domestic partner is subject to a no contest clause may depend on whether the alleged contract gave the party an existing interest in the property, or whether the agreement was to leave property to her at death.

D. Unintended Consequences

1. A no contest clause intended to prevent a post-death property dispute may cause a subsequent gift to be treated as an unintended forfeiture. A drafter whose focus is on preventing one type of dispute; e.g. between the children from a prior marriage and the surviving spouse, may instead precipitate litigation among rival siblings.

2. Consider a sole surviving parent with adult children whose trust includes a no contest clause covering property disputes without a probable cause exception. Schedule A to the Trust instrument lists a condominium that the parent owns in which his adult daughter lives. Years after signing the trust (and the first spouse's death), the client transfers title to the condominium to himself and his daughter as joint tenants. After the client dies, a sibling who is hostile to the daughter becomes trustee. He petitions the court under Section 850 to order the daughter to reconvey the home to the trust, claiming that the joint tenancy transfer was for convenience only, and that the condominium should be distributed to the trust beneficiaries pursuant to the trust terms. The daughter's response to the section 850 petition will be, strictly according to the terms of the new statute, considered a violation of the no contest clause. Drafters may consider expanding the definition of "probable cause" to include filing a responsive pleading to avoid the incongruous, and unfair, result that a pleading filed in defense will cause a forfeiture.

3. Clients have been known to transfer property listed on a trust's Schedule A without consulting their attorney. Drafters should be wary about

drafting broad no contest clauses that expressly provide that they apply to a transfer of property on the grounds that it was not the transferor's property at the time of the transfer. If the client insists on using a no contest clause to put a spouse to an election, planners should draft their no contest clauses to apply to the spouse only, and not, as frequently occurs, to "any beneficiary."

E. Creditor's Claim

1. The new law retains existing law with regard to creditor's claims. If the no contest clause expressly provides for such application, a no contest clause may apply to the filing of a creditor's claim or prosecution of an action based on a creditor's claim. As with property ownership claims, probable cause is not a defense and the contestant is not likely to be able to use declaratory relief to determine whether filing the creditor's claim will be a contest. A dispute over a decedent's title to specific property alleged to be included in the decedent's estate is not a "claim" for purposes of the creditor's claim statute.

2. Estate planners should be cautious about drafting no contest clauses that expressly provide that they apply to creditor's claims. The fact that the claim arises after the client signs the estate plan is no defense to forfeiture. The clause may disinherit a child who advances funds to pay for a parent's funeral expenses or medical bills. In that situation, an attorney counseling an executor administering a will that contains a no contest clause applicable to creditor's claims should consider counseling her client to pay the decedent's debts justly due

without requiring a creditor-beneficiary to file a claim in accordance with Probate Code section 11005. Similarly, the attorney should consider advising a trustee to not initiate a claim procedure. Nevertheless, if the executor or trustee is a person hostile to the creditor-beneficiary, they may not be willing to comply with the attorney's advice.

3. The inclusion of a probable cause exception when referring to creditors' claims in a no contest clause may be a salutary modification to the statutory blunderbuss. Many claims against an estate do not require the filing of a creditor's claim. Many claims filed by beneficiaries are proper debts of the decedent that he or she would never have intended to be covered by the no contest clause. The most obvious examples of such claims are funeral and last illness expenses.

4. Establishing probable cause in connection with a creditor's claim should be short work for the court. Conversely, omitting the probable cause standard when referring to a creditor's claim in a no contest clause is unlikely to advance the testator's vision of a litigation-free administration.

V. GENERAL FACTORS TO CONSIDER WHEN DRAFTING

A. Threshold Questions

1. A fundamental question that planners ask too infrequently of the testator is "Why are you making this gift?" The incongruity of leaving a bequest to a person that the testator does not trust seemingly escapes both client and drafter. A practice tip for a drafter: when the client expresses a desire to impose a

forfeiture upon a beneficiary, explore at greater depth the testator's attitude toward that beneficiary. The result may be that the client truly does not want to leave a gift to the affected individual, but has been controlled by guilt or similar feelings. The planner can make a positive contribution to the client and the rest of the family by having the testator make the uncomfortable decision to omit the individual while the testator is still living.

2. *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?

3. *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 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.

4. *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. Better yet, the drafter should replace the no contest clause with a conditional gift.

B. Whether a Need Exists

1. 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 who is resolved upon the use of an *in terrorem* clause 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.

2. 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. The method by which a testator can avoid this result is by a disinheritance clause.

3. A no contest clause under the new regime is intended to deter litigation; 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.

4. 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 observations, however, are equally true:

- ❖ 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.
- ❖ 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.

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

❖ An unhappy beneficiary may skirt the no contest clause by structuring their action as a petition for instructions under Probate Code section 17200

VI. CONDITIONAL GIFTS AN ALTERNATIVE TO NO CONTEST CLAUSES

A. Avoiding the Statute

A conditional gift is not governed by the new no contest clause statute, and therefore would appear to permit one spouse to put the other to a forced election without use of a no contest clause. A clause that imposes a choice upon a beneficiary can be enforced without requiring the filing of a pleading, hence avoiding the reach of the statute entirely.

B. Distinction

1. An important distinction between no contest clauses and conditional gifts is that the former is defined by statute and the latter is not. This difference is more than one in form: the legislature has determined that testamentary freedom concerning contest will be limited, but conditional gifts will not.

2. Analytically, the difference is that a no contest clause imposes a condition subsequent, which the legislature views as an unacceptable forfeiture. A conditional gift imposes a condition precedent, which is enforceable.

C. Examples

1. Testator directs the personal representative to distribute Whiteacre to the survivor on condition that the survivor conveys Blackacre to the decedent's children from a prior marriage. If the survivor refuses, her failure to convey Blackacre is not a contest, because no pleading is required to be filed. The survivor may lose the gift of Whiteacre, but she will not forfeit any other gift under the instrument. Similarly, the survivor should not suffer a forfeiture if she petitions the court to instruct the trustee.

2. Assume a second marriage, and that the testator and survivor have been married for many years. The testator wants Blackacre to pass to his children from a prior marriage at death. Both Blackacre and Whiteacre are at least partially community property and each spouse's estate is worth \$10 million. Under the new law, the decedent can gift Blackacre to his children and Whiteacre to his spouse, and add a no contest clause to force the surviving spouse to elect between enforcing her community property rights or the gift under the instrument. The survivor cannot petition the court to enforce her community property rights without violating the no contest clause.

3. Alternately and perhaps more calculated to avoid litigation, the decedent's instrument can declare that the community has a partial interest in both Blackacre and Whiteacre and that the decedent agrees that the community property can be divided on a non-pro rata division of its aggregate value. The instrument then would condition the gift of Whiteacre to the surviving spouse on her post-death

written agreement to the non pro rata division allowing for the gift of Blackacre to the children. Resolving the uncertainty over marital property through a conditional gift will not cause the surviving spouse to suffer a forfeiture for filing a pleading. For example, conducting an investigation as to the properties' respective values to obtain the information needed to make an informed election should not require the involvement of the judicial process.

4. These dispositions are not disguised no contest clauses. A no contest clause penalizes a beneficiary for filing a pleading. The conditional gift described above does not punish the beneficiary for filing a pleading. Rather than creating even more likelihood for discord by raising the stakes with a broadly-drawn no contest clause, drafters should advise their client to consider conditional gifts.

VII. DRAFTING CONSIDERATIONS

A. When to Consider Including a No Contest Clause

A common fact pattern suggesting the inclusion of a no contest clause typically includes a beneficiary who feels cheated, whether a child, spouse, or care-provider, resulting from perceived unfairness. The drafter will need to explore these possibilities at length with the client when the proposed plan presents the possibility of this result. Ironically, the new statute may encourage a return to the use of old-fashioned "generic" clauses due to the limited applicability of these clauses.

B. Elements of a No Contest Clause

1. Every no contest clause, whether generic or finely crafted, addresses four common elements:

- ❖ The *beneficiary* who can precipitate a contest;
- ❖ The *grounds* upon which a contest is triggered;
- ❖ The *document* being challenged that creates the contest; and
- ❖ The *assets* that will be forfeited as a result of the contest.

2. A no contest clause can be directed at all beneficiaries, a class of beneficiaries, or a particular beneficiary. A generic clause is typically directed at all beneficiaries. Such a broad approach is not required by the new law. One of the essential duties of the drafter is to discuss with the testator the identity of likely contestants. 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. This basic fact should encourage testators and drafters to craft a no contest clause that identifies the individuals against whom it is directed.

3. The potential contest can manifest itself by a variety of potential actions. A child may file a creditor's claim for reimbursement of funds expended for the decedent's funeral and last illness costs. A child may also bring a claim alleging that undue influence was exerted over the testator/settlor or that the testator/settlor lacked capacity to create a testamentary instrument. A child may also make a claim based on an oral contract to create a will.

4. Common actions brought by a surviving spouse that may trigger a no contest clause are creditor's claims or petitions under Probate Code section 850 to determine the ownership of property.

5. Care Providers may file creditor's claims or file an action based on an alleged oral contract to make a will.

6. Given these fact patterns, how should we address the restrictions that the testator wishes to improve? Stated alternately, who will be the likely defender/proponent of the will, and what tools does the testator wish to make available to that person?

C. Alternate Drafting Tools

1. This discussion has focused on no contest clauses and conditional gifts, but other tools are available.

2. For example, the instrument can provide the fiduciary with the discretion to charge against the beneficiary's share the legal costs of any unsuccessful judicial action brought by that beneficiary. This condition is not a forfeiture along the lines of a no contest clause, but it can serve as a disincentive to a beneficiary who is contemplating bringing a meritless claim that would not otherwise violate a no contest clause.

3. Another example might be a clause that permits the fiduciary to charge the share of the beneficiary for additional administration costs resulting from the beneficiary's unreasonable behavior.

4. Equally: is the testator seeking to protect the entire plan, or a particular gift? Obviously, each gift is an integral part of the entire plan, but a specific gift of Blackacre to a favored relative ought not to require the same safeguards as a disposition of one-half the residue to a previously undisclosed paramour.

D. Effective Dates

Make it easy on yourself: start drafting for post 2009 right now. Nothing under current law would make unenforceable a clause effective under new law.

E. NO MORE BOILERPLATE!

1. Thoughtless inclusion of formalistic no contest clauses should have disappeared several years ago, but even if it didn't, application of the new law will demand thoughtful consideration of these clauses in future documents.

2. The presumption of unenforceability reduces the perceived need for these clauses.

3. Conversely, inclusion of these clauses will require a great deal more thought, in order to avoid tripping over the statutory obstacles.

4. Consider existing law: e.g. *Estate of Richter* (1993) 12 Cal. App.4th 1361 when drafting for property characterization issues. Differentiating between "the property" and "my property" can become significant.

VIII. SUGGESTED CLAUSES

A. "If any beneficiary under this instrument [**optional:** *If John Doe or the children of Jane Doe*], singularly or in combination with any other person or persons, directly or indirectly does any of the following listed acts then the right of that beneficiary to take any interest given to him or her by this instrument shall become void;

any gift of the trust property to which the beneficiary would otherwise have been entitled shall pass as if he or she had predeceased the settlor[s] [**optional:** *without issue*]. If the beneficiary without probable cause challenges the validity of this instrument [**optional:** , *or challenges the validity of any contract, agreement (including any trust agreement), declaration of trust, beneficiary designation, or other document executed by the settlors or either of them, or executed by another for the benefit of the settlors or either of them that is in existence on the date that this instrument is executed and further described as _____*](**provide express identification of such items, either individually or as a class**),] on any of the following grounds:

- (a) Forgery;
- (b) Lack of due execution;
- (c) Lack of capacity;
- (d) Menace, duress, fraud, or undue influence;
- (e) Revocation pursuant to the terms of this instrument [*optional:* or other applicable instrument, document, or contract] or applicable law;
- (f) Disqualification of a beneficiary who is a “disqualified person” as described in California Probate Code section 21350 or applicable successor statute.

OR

B. If any beneficiary under this instrument, singularly or in combination with any other person or persons, directly or indirectly does any of the following acts, then the right of that beneficiary to take any interest given to him or her by this instrument shall become void, and any gift or other interest in the trust property to which the beneficiary would otherwise have been entitled shall pass as if he or she had predeceased the settlor[s] [**optional:** *without issue*]. (a) Without probable cause challenges the validity of

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January 22, 2010

this instrument [**optional:** , or without probable cause challenges the validity of any contract, agreement (including any trust agreement), declaration of trust, beneficiary designation, or other document executed by the settlors or either of them, or executed by another for the benefit of the settlors or either of them that is in existence on the date that this instrument is executed and further described as _____(**provide express identification of such items, either individually or as a class**),] on any of the following grounds:

- (1) Forgery;
 - (2) Lack of due execution;
 - (3) Lack of capacity;
 - (4) Menace, duress, fraud, or undue influence;
 - (5) Revocation pursuant to the terms of this instrument [*optional:* or other applicable instrument, document, or contract] or applicable law;
 - (6) Disqualification of a beneficiary who is a “disqualified person” as described in California Probate Code section 21350 or applicable successor statute.
- (b) [**optional:** *Without probable cause files*] **or** Files a creditor’s claim or prosecutes any action against the trust for any debt alleged to be owed by the settlor;
- (c) [**optional:** *Without probable cause files*] **or** Files a pleading to challenge the transfer of property under this trust on the grounds that it was not the transferor’s property at the time of the transfer.

OR

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January 22, 2010

C. No Contest Clause Applicable to Any Trust That Becomes Irrevocable After 2009. Any trust created by this instrument that becomes irrevocable after 2009 shall be subject to the no contest clause in this Section _____. If without probable cause (as defined by California Probate Code § 21311(b), operative January 1, 2010, or any successor statute), any beneficiary under this instrument, singularly or in combination with any other person or persons, files a direct contest (as defined by California Probate Code § 21310, operative January 1, 2010, or any successor statute) that alleges the invalidity of this instrument or any one or more of its terms or that alleges the invalidity of any will of the settlor or any one or more of its terms, which is in existence on the date this instrument is executed, then the right of that person to take any interest given to him or her by this instrument shall be void, and any gift or other interest in the trust property to which the beneficiary would otherwise have been entitled shall pass as if he or she had predeceased the settlor without issue.

OR

D. No Contest Clause Applicable If Testator Dies After 2009. If I die after 2009, this will shall be subject to the no contest clause in this Section _____. If, without probable cause (as defined by California Probate Code § 21311(b), operative January 1, 2010, or any successor statute), any person, singularly or in combination with any other person or persons, files a direct contest (as defined by California Probate Code § 21310, operative January 1, 2010, or any successor statute) that alleges the invalidity of this will or any one or more of its terms, any gift or other interest given to that person under this will shall be revoked and shall be disposed of as if he or she had predeceased me without issue.

OR

E. No Contest Clause Applicable to Any Trust That Becomes Irrevocable After 2009. Any trust created by this instrument that becomes irrevocable after 2009 shall be subject to the no contest clause in this Section _____. If any beneficiary under this instrument, singularly or in combination with any other person or persons, does any of the following acts, then the right of that person to take any interest given to him or her by

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this instrument shall be void, and any gift or other interest in the trust property to which the beneficiary would otherwise have been entitled shall pass as if he or she had predeceased the settlor without issue:

(a) Without probable cause (as defined by California Probate Code § 21311(b), operative January 1, 2010, or any successor statute), files a direct contest (as defined by California Probate Code § 21310, operative January 1, 2010, or any successor statute) that alleges the invalidity of this instrument or any one or more of its terms;

(b) Without probable cause (as defined by California Probate Code § 21311(b), operative January 1, 2010, or any successor statute), files a direct contest (as defined by California Probate Code § 21310, operative January 1, 2010, or any successor statute) that alleges the invalidity of any other instrument, or any one or more of the terms of such other instrument, which is in existence on the date this instrument is executed, such as a will, declaration of trust, contract, agreement (including any trust agreement), beneficiary designation, or other document executed by the settlor constituting part of an integrated estate plan or executed by another for the benefit of the settlor;

(c) Files any creditor's claim or prosecutes any action against the trust for any debt alleged to be owed by the settlor; or

(d) Files any pleading (as defined by as defined by California Probate Code § 21310(d), operative January 1, 2010, or any successor statute) challenging any transfer of property on the grounds that it was not the transferor's property at the time of the transfer.

OR

F. No Contest Clause Applicable If The Testator Dies After 2009. If I die after 2009, this will shall be subject to the no contest clause in this Section _____. If any person singularly or in combination with any other person or persons, does any of the following acts, then any gift or other interest given to him or her under

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this will shall be revoked and shall be disposed of s if he or she had predeceased me without issue:

(a) Without probable cause (as defined by California Probate Code § 21311(b), operative January 1, 2010, or any successor statute), files a direct contest (as defined by California Probate Code § 21310, operative January 1, 2010, or any successor statute) that alleges the invalidity of this will or any one or more of its terms;

(b) Without probable cause (as defined by California Probate Code § 21311(b), operative January 1, 2010, or any successor statute), files a direct contest (as defined by California Probate Code § 21310, operative January 1, 2010, or any successor statute) that alleges the invalidity of any other instrument, or any one or more of the terms of such other instrument, which is in existence on the date this will is executed, such as a declaration of trust, contract, agreement (including any trust agreement), beneficiary designation, or other document executed by me constituting part of an integrated estate plan or executed by another for my benefit;

(c) Files any creditor's claim or prosecutes any action against my estate for any debt alleged to be owed by me; or

(d) Files any pleading (as defined by as defined by California Probate Code § 21310(d), operative January 1, 2010, or any successor statute) challenging any transfer of property on the grounds that it was not my property at the time of the transfer.

G. No Contest Clause Applicable If The Testator Dies After 2009 Excluding Responsive Pleadings. If I die after 2009, this will shall be subject to the no contest clause in this Section _____. If any person singularly or in combination with any other person or persons, does any of the following acts, then any gift or other interest given to him or her under this will shall be revoked and shall be disposed of s if he or she had predeceased me without issue:

(a) Without probable cause (as defined by California Probate Code § 21311(b), operative January 1, 2010, or any successor statute), files a direct contest (as

defined by California Probate Code § 21310, operative January 1, 2010, or any successor statute) that alleges the invalidity of this will or any one or more of its terms;

(b) Without probable cause (as defined by California Probate Code § 21311(b), operative January 1, 2010, or any successor statute), files a direct contest (as defined by California Probate Code § 21310, operative January 1, 2010, or any successor statute) that alleges the invalidity of any other instrument, or any one or more of the terms of such other instrument, which is in existence on the date this will is executed, such as a declaration of trust, contract, agreement (including any trust agreement), beneficiary designation, or other document executed by me constituting part of an integrated estate plan or executed by another for my benefit;

(c) Files any creditor's claim or prosecutes any action against my estate for any debt alleged to be owed by me or

(d) Files any pleading (as defined by as defined by California Probate Code § 21310(d), operative January 1, 2010, or any successor statute) challenging any transfer of property on the grounds that it was not my property at the time of the transfer. This provision shall not include in the definition of “any pleading” a responsive pleading that seeks to defend the beneficiary’s interest in property from attack.

IX. ALTERNATE CLAUSES

A. Charge Against Beneficiary Share.

“The Trustee [or Executor] is empowered and authorized to reduce the bequest left to any beneficiary [**optional:** or *John Doe* or *the children of Jane Doe*] by the sum of the attorneys’ fees, fiduciary fees, and direct costs incurred by the Trustee [or Executor] in defending or responding to said beneficiary’s unreasonable demands upon the Trustee [or Executor] in connection with the trust [or probate]

administration resulting from the settlor's [or my] death. The fiduciary is authorized to file a petition for instructions with the court seeking a determination regarding the reasonableness of said beneficiary's conduct. The cost of such judicial proceeding shall be a further charge against the share of said beneficiary if the court finds the particular conduct to have been unreasonable, and shall be an ordinary cost of administration if the court finds the conduct to have been reasonable. In no event, however, shall any pleading filed in such proceeding be treated as a violation of any no contest clause contained in this instrument."

B. No Recovery of Costs.

"No beneficiary may receive any reimbursement from the trust [or probate] estate for any fees or costs incurred by that beneficiary in pursuing any remedy, by judicial process or otherwise, against the trustee, unless the adjudicator finds that the trustee's complained-of conduct was intentional, reckless, or in bad faith. No pleading filed by any beneficiary in connection with such proceeding shall be treated as a violation of the no contest clause contained in this instrument."

C. Failure To Mediate in Good Faith.

"A refusal by any beneficiary to mediate in good faith any dispute with the fiduciary shall be a failure of a material condition of the gift to that beneficiary, which shall result in that beneficiary losing any future benefits of the gift provided for by this instrument."

X. CONCLUSION

In the end, estate planning attorneys will determine the extent to which the new law succeeds in reducing no contest clause litigation. Estate planning attorneys should use no contest clauses sparingly and cautiously. They should make sure that their clients understand the possible draconian consequences to their loved ones of including a no contest clause. They should consider less severe alternatives to achieve their clients' wishes, such as conditional gifts. They should consider tailoring the object of the clause to a particular beneficiary or class of beneficiaries, rather than allowing the clause to apply to "any beneficiary." Above all, they should not insert a boilerplate no contest clause into every trust and will that they draft.