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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*¹ and *Genger v. Delso*² 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.³ The legislative response to the judicial expansion of a "one size fits all" approach was Probate Code § 21305(a),⁴ which makes the generic no contest clause obsolete, meaning "ineffective," to trigger a "contest" in three identified circumstances.⁵

*Estate of Ferber*⁶ 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.⁷ 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.



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

- A Trust Agreement executed on or after January 1, 2001 **does** contain a no contest clause; its amendment also executed on or after January 1, 2001 **AMENDS** the no contest clause. Result: § 21305(a) **applies** to the no contest clause, as amended.

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

The trap for the unwary under § 21305(c) is an erroneous assumption that § 21305(a) would apply to a no contest clause in a pre-2001 instrument simply because an amendment was **executed** after January 1, 2001. If the client wishes the clause to be effective in such circumstances, drafters would be prudent to include an updated no contest clause in a post-effective date amendment.

III. DRAFTING SUGGESTIONS

A. First Considerations

The sample language attempts to reflect the reality that clients differ in their needs and desires regarding no contest clauses. The draft language is for trust agreements; a similar clause should be included in the client's will.

An effective no contest clause contains four components:

- It *defines* the *contesting beneficiary* (whether all beneficiaries or limited to one or more);
- It *identifies* the *document* that, when contested, triggers forfeiture;
- It states the *grounds* of a contest (what contents of a pleading triggers the contest); and
- It specifies what *assets* are *forfeited* by the contest of a specified document.

Identifying the persons to be covered by the clause should be the easiest of these criteria to satisfy. Usually the settlors have a clear idea of the "trouble-maker" and are willing to articulate their concerns about the individual or individuals. Nevertheless, the drafter should explore with the client unexpected candidates for mischief who may not be beneficiaries. A favorite example is a disfavored child-in-law, or former child-in-law who remains the parent of the favored grandchildren. The typical "conspiracy" language in a generic no contest clause may not extend to such persons because they are not usually beneficiaries. Additionally, if the in-law is a *former* in-law, the typical attribution language contained in a generic clause would not apply.

Identifying the "document" in a clause subject to § 21305(a) presents challenges. One question is whether the clause can apply to existing irrevocable documents. For example, the authors are uncertain whether current law would permit the no contest clause in a revocable trust to define an attack on an existing irrevocable life insurance trust as a contest of the revocable trust. This retroactive "shoe-horning" of a document into a later no contest clause would appear antithetical to the statutory purpose of § 21305. Predictability of enforcement of no contest clauses was an essential legislative purpose (presumably) underlying the statute. Allowing an *ex post facto* "gotcha," however, seems contrary to that purpose, as well as allowing undue influencers to take unfair advantage of a settlor's existing plan. Nevertheless, the literal terms of the statute would appear to permit such retroactive disqualification.

Ideally, the definition of "document" within the no contest clause contained in a typical trust agreement would apply to those instruments executed after the date of the Trust Agreement. Additionally, the clause could also be specifically limited to documents executed during the joint lifetimes of the settlors. These dates reflect the presumed intent of settlors that a document changed by a surviving settlor after the death of a deceased settlor should not, if unsuccessfully contested, forfeit assets contained in an irrevocable trust created by both settlors.⁸ This post-execution time-frame also reflects the judgment of appellate courts to date regarding the presumed intent of joint settlors. If particular clients have a different intent, the no contest clause should be tailored accordingly.⁹

The drafter should also consider avoiding the inclusion of a blanket reference to "proceedings." A contemporary no contest clause (*i.e.*, post January 1, 2001) should not assume that every "proceeding" ought to be included. Both §§ 21300(b) and (c) require that a "contest," whether direct or indirect, consist of a "pleading in a proceeding in any court." The implication is that a no contest clause that attempts to trigger forfeiture by an action *other than* by the filing of a pleading is invalid. For example, a beneficiary could not trigger forfeiture under a generic no contest clause by sending a demand letter claiming a will or trust is invalid based on undue influence or by participating in pre-litigation mediation. Even without the apparent statutory limitation of § 21300 to "a pleading," a no contest clause that attempted to trigger a forfeiture based on an action other than the filing of a pleading might be unenforceable based on public policy.

A generic no contest clause purports to require a forfeiture of all assets otherwise due the beneficiary under the document. This approach has become common practice through repetition rather than thoughtful consideration. The drafter may suggest that the trustor consider a partial loss of a bequest, rather than total forfeiture. For example, if the prized family asset is stock in the family corporation, the trustor may choose to limit the forfeiture to the gift of that asset. By creating such limitation, the settlor (and the drafter) may make it easier for a court to enforce the no contest clause.

B. One Trustor, Direct Contest Only, Includes Amendments

The first example prohibits only direct contests within the meaning of Probate Code § 21300. This clause may be suitable for a client who wishes to balance the utility of deterring litigation with the reality that a broader clause may result in unanticipated litigation under § 21320, or have a chilling effect on petitions that the settlor had not anticipated. Indeed, "double litigation" may arise from the filing of a petition under § 21320, followed by a filing of the underlying petition.

If any Beneficiary under a Document files in any court a Direct Contest of a Document, then any share or interest in the Trust Estate given to or for the benefit of such Beneficiary is revoked and shall be disposed of in the same manner provided herein as if the Beneficiary had predeceased the Trustor without issue. Only a Direct Contest can trigger the application of this clause.

A "Direct Contest" means a pleading filed in any court that alleges the invalidity of a Document, or one or more of the terms of a Document, on one or more of the following grounds:

- (1) Revocation;
- (2) Lack of capacity;
- (3) Fraud;
- (4) Misrepresentation;
- (5) Menace;
- (6) Duress;
- (7) Undue Influence;
- (8) Mistake;
- (9) Lack of due execution;
- (10) Forgery.

A "Document" means this Trust Agreement, an amendment to this Trust Agreement, the Trustor's Will executed on or after the date of this Trust Agreement, a codicil to the Trustor's Will executed on or after the date of this Trust Agreement, a beneficiary designation for an individual retirement account ("IRA") executed by the Trustor on or after the date of this Trust Agreement, a beneficiary designation for an insurance policy on the Trustor's life executed by the Trustor on or after the date of this Trust Agreement, a buy-sell agreement executed by the Trustor on or after the date of this Trust Agreement, a deed or other document transferring title to the Trustee of this Trust Agreement, including amendments.

The Trustee is authorized to defend, at the expense of the Trust Estate, against any Direct Contest of a Document.

This last clause is intended to counteract the implication of certain recent case authority that only beneficiaries may oppose a will or trust contest.¹⁰

C. One Trustor, Modification to Add Specific Description Required Under § 21305(a).

The following clause is the same as the one above but includes language pertaining to a creditor's claim. The additional language is in italics.

If any beneficiary under a Document ("Beneficiary") files in any court (1) a Direct Contest, (2) *a complaint to enforce a rejected creditor's claim (other than for funeral expenses or expenses of decedent's last illness) filed by the beneficiary in the Trustor's probate estate or against the Trustee of any subtrust created under this instrument or against a beneficiary thereof, or (3) an action or proceeding to determine the character, title, or ownership of property that conflicts with any one or more provisions of a Document*, then any share or interest in the Trust Estate given to or for the benefit of the Beneficiary is revoked and shall be disposed of in the same manner provided herein, as if the Beneficiary had predeceased the Trustor without issue. *For the purpose of the preceding sentence "creditor's claim" includes any action to enforce a contract to make a will, or an action asserting that the decedent's property is liable to the claimant, other than for funeral expenses or decedent's last illness expenses.*

D. One Trustor, Includes Above Modification and Adds Broad Language to Encompass "Contests" Other Than Direct Contests and § 21305(a) Actions.

If any beneficiary under a Document ("Beneficiary") files in any court (1) a Direct Contest, (2) a complaint to enforce a rejected creditor's claim (other than for funeral expenses or expenses of decedent's last illness) filed by the beneficiary in the Trustor's probate estate or against the Trustee of any subtrust created under this instrument or against a beneficiary thereof, (3) an action or proceeding to determine the character, title, or ownership of property that conflicts with any one or more provisions of a Document, or (4) *any other pleading that conflicts with any one or more provisions of a Document*, then any share or interest in the Trust Estate given to or for the benefit of the Beneficiary is revoked and shall be disposed of in the same manner provided herein as if the Beneficiary had predeceased the Trustor without issue. For the purpose of the preceding sentence, "creditor's claim" includes any action to enforce a contract to make a will, or an action asserting that the decedent's property is liable to the claimant, other than for funeral expenses or decedent's last illness expenses.

IV. JOINT TRUST AGREEMENT, A-B OR A-B-C TRUST

A. Joint Trust, Direct Contest

This clause mirrors the one above. It differs, however, in referring to the several subtrusts if created upon the first spouse's death.

Practitioners should be sure to substitute the correct name of the specific subtrusts, if different than "Survivor's", "By-Pass", or "Marital."

If any beneficiary under a Document ("Beneficiary"), files in any court a Direct Contest against any Document, then any share or interest in the Survivor's Trust, the Marital Trust, the By-Pass Trust, or any other subtrust created under this Trust Agreement, given to or for the benefit of the Beneficiary, is revoked and shall be disposed of in the same manner provided herein as if the Beneficiary had predeceased the Trustor without issue. Only a Direct Contest can trigger the application of this no contest clause.

"Direct Contest" means a pleading filed in any court that alleges the invalidity of a Document, or one or more of the terms of a Document, on one or more of the following grounds:

- (1) Revocation;
- (2) Lack of capacity;
- (3) Fraud;
- (4) Misrepresentation;
- (5) Menace;
- (6) Duress;
- (7) Undue Influence;
- (8) Mistake;
- (9) Lack of due execution;
- (10) Forgery.

A "Document" means this Trust Agreement, an amendment to this Trust Agreement executed by both Trustors, the Survivor's Trust, [OPTIONAL: an amendment to the Survivor's Trust executed by the surviving trustor after the death of the deceased trustor], the By-Pass Trust and the Marital Trust, [OPTIONAL: and all other subtrusts created under this Trust Agreement], the will of each Trustor executed on or after the date of this Trust Agreement during the joint lifetimes of both Trustor, a codicil to such Will executed during the lifetime of both Trustors, a beneficiary designation for an insurance policy on the life of either or both Trustors executed on or after the date of this Trust Agreement during the joint lifetimes of both Trustors, a beneficiary designation for an individual retirement account ("IRA") or other retirement plan executed by a Trustor on or after the date of this Trust Agreement during the joint lifetimes of both Trustors.

The Trustee is authorized to defend, at the expense of the Trust Estate, against a Direct Contest of a Document.

The "optional" clauses identified above should be carefully considered before inclusion, and should *always* be specifically discussed with both Trustors. Another alternative to discuss with the clients, if those options create awkwardness, is the following:

Notwithstanding any provision of this no contest clause to the contrary, if the Survivor's Trust is amended only by the Surviving Trustor, and such amendment changes any dispositive provision of the Survivor's Trust, then the forfeiture shall be limited to the Survivor's Trust.

B. Modification to Paragraph II.A.

This suggested clause adds the specific description required under § 21305(a). The drafting attorney should inquire from the client if each part (1), (2) and/or (3) is desired and draft accordingly. A particular client may wish specific language dealing with a specific situation, asset, or beneficiary. Note that § 21305(a)(3) is described in the definition of "Document." Additional language is in italics.

If any beneficiary under a Document ("Beneficiary") files in any court (1) a Direct Contest, (2) *a petition to determine the character of property as community or separate that conflicts with the characterization of such property in any Document, or (3) a complaint to enforce a creditor's claim (other than for funeral expenses or expenses of decedent's last illness) filed by the beneficiary in the Trustor's probate estate or against the Trustee of any subtrust created under this instrument or against a beneficiary thereof*, then any share or interest in the Trust Estate, the Survivor's Trust, the Marital Trust, and any other subtrust given to or for the benefit of the Beneficiary is revoked and shall be disposed of in the same manner provided herein as if the Beneficiary had predeceased the Trustor without issue. *For the purpose of the preceding sentence "creditor's claim" includes any action to enforce a contract to make a will, or an action asserting that the decedent's property is liable to the claimant, other than for funeral expenses or decedent's last illness expenses.*

Notwithstanding any provision of this no contest clause to the contrary, if the Survivor's Trust is amended only by the Surviving Trustor, and such amendment changes any dispositive provision of the Survivor's Trust, then the forfeiture shall be limited to the Survivor's Trust.

C. Modification to Introductory Clause to Add Broader Application of No Contest Clause. Additional Language Is in Italics.

If any beneficiary under a Document ("Beneficiary") files in any court (1) a Direct Contest, as defined below; (2) *a petition to determine the character of property as community or separate that conflicts with the*