ALI-ABA Topical Courses

In Terrorem Clauses:
Avoiding Will Contests and Disinheritance

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No Contest Clauses in Wills and Trusts

By
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APPENDIX I

IN TERROREM CLAUSES: AVOIDING WILL CONTESTS AND DISINHERITANCE

NO CONTEST CLAUSES IN WILLS AND TRUSTS

INTRODUCTION

A testator or settlor dies with a will or trust in place that contains a clause penalizing those who challenge the will or the trust, known as an in terrorem or no-contest clause. Courts across the country are faced with the task of balancing competing public policies to determine the extent to which such clauses will be enforced, if at all. One policy at issue stems from the basic principle that courts wish to honor a testator or settlor’s intent. When a no-contest clause it at issue, directly at odds with honoring the decedent’s intent is the policy that equity abhors forfeiture. Many states have taken the position that such clauses will be enforced, albeit to a limited extent. Rationales for enforcement of in terrorem clauses are grounded on the theory that such clauses lessen the chance frivolous litigation will be brought against the estate, preserving the estate’s assets and lessening the likelihood the deceased’s reputation will be attacked when he or she is no longer alive to respond. At the same time, many courts recognize that there is a public interest in ensuring that a transfer is valid and was not procured by unlawful means, thus taking the position that challenges brought in good faith with probable cause should be permitted without fear of forfeiture.

Taking into consideration the competing policies at stake, states have taken varying approaches in determining whether such clauses are given effect. Some states enforce the clauses without exception, while other states have taken a view that no-contest clauses will not be enforced if the beneficiary has probable cause to bring a contest, and a few states have refused to enforce such clauses under any circumstances. States that have elected to enforce such clauses routinely adopt a narrow interpretation of both the clause and the challenges that qualify as a “contest” under the clause.

This paper is meant to illustrate the different approaches states across the country have taken when confronted with the task of analyzing and enforcing in terrorem clauses under various circumstances. This paper is not intended to be an exhaustive analysis of in terrorem clauses, but rather a general overview of the approaches taken by uniform laws, legal commentators, and 15 select states, including:

California  Illinois  New Jersey
Colorado  Kentucky  New Mexico
Connecticut  Massachusetts  New York
Florida  Missouri  Pennsylvania
Georgia  Nebraska  Texas
UNIFORM PROBATE CODE

(Gerald Carp and Jules Haskell)

The Uniform Probate Code contains two identical provisions relating to penalties for contesting a will: (i) Section 2-517, which is part of Article II on Intestacy, Wills, and Donative Transfers, and (ii) Section 3-905, relating to Probate of Wills and Administration. These provisions read as follows:

“A provision in a will purporting to penalize an interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings.”

This section appears to place the burden of proving “probable cause” on the will contestant. Without such proof, the in terrorem clause will be enforced.

Proof of probable cause may also determine who pays for the examination of witnesses and other discovery. Local law may provide that in all events the estate pays for the costs of the examination of the draftsman and two of the witnesses to the will. Which party is charged with the costs of additional examinations and other discovery may be dependent upon whether the contestant establishes such probable cause.

UNIFORM TRUST CODE

The Uniform Trust Code contains no provisions addressing the enforceability of in terrorem or no-contest clauses in trusts. The decision to omit any mention of in terrorem or no-contest clauses from the Uniform Trust Code was intentional. It appears that the Uniform Laws Commissioners concluded that it would not be productive to introduce another public policy issue into the lengthy drafting process of the final UTC.

RESTATEMENT POSITION

The Restatement of the Law on Trusts specifically addresses no-contest clauses, providing that “a no-contest clause may not be enforced to the extent that doing so would interfere with the enforcement or proper administration of the trust.” Restatement (Third) of Trusts § 96. The comments recognize that the general purpose behind no-contest clauses is to deter challenges as to the validity of a donative instrument rather than to inhibit litigation to enforce a trust created by the instrument. No-contest clauses are generally enforceable in most jurisdictions, but such enforcement is subject to statutory or common law limitations and are construed narrowly. Restatement (Third) of Trusts, cmt. e. Similarly, the Restatement of Trusts takes the position that a no-contest clause that would be otherwise enforceable is unenforceable to the extent enforcement would inhibit beneficiaries’ enforcement of their rights under the trust. Restatement (Third) Trusts § 96. Thus, suits to enforce the duties of trustees or determine the proper meaning or effect of trust terms normally would not constitute a “contest” and a no-contest clause would not be implicated.
The Restatement of the Law of Property: Wills & Other Donative Transfers also addresses no-contest clauses, providing that “A provision in a donative document purporting to rescind a donative transfer to, or a fiduciary appointment of, any person who institutes a proceeding challenging the validity of all or part of the donative document is enforceable unless probable cause existed for instituting the proceeding.” Restatement (Third) Property § 8.5. The comments indicate that such clauses are “construed narrowly, consistent with their terms.” The comments also recognize that the validity of no-contests clauses is not universally accepted, nor is the probable cause exception the Restatement advocates.

The Restatement of the Law on Property also echoes the Restatement of Trusts, by stating that “An otherwise effective provision in a will or other donative transfer, which is designed to prevent the acquisition or retention of an interest in property in the event there is a contest of the validity of the document transferring the interest or an attack on a particular provision of the document, is valid, unless there was probable cause for making the contest or attack.” Restatement (Second) Property § 9.1. The Restatement recognizes that restraints against contests do more than preserve the disposition of the transferor against overthrow; such clauses also tend to lessen not only the wasting of the estate in litigation but also attacking the reputation of the decedent when he or she is no longer alive to provide a defense. Comment a further discusses the rationale for the probable cause exception. Restatement (Second) Property § 9.1 cmt. a. The probable cause exception recognizes that it would be a contravention of public policy to place such a strong deterrent on an action challenging the transfer with probable cause. Thus, under the Restatement, the policy of ensuring valid transfers is balanced against refusal to enforce the forfeiture where there is probable cause to believe a donative transfer is not valid.

TREATISES

Bogert’s Trusts devotes a section to the validity and enforcement of In terrorem clauses. When called upon to construe no-contest clauses the courts must walk the line between two well-established principles. George Gleason Bogert, George Taylor Bogert & Amy Morris Hess, Bogert’s Trusts and Trustees, § 181 (2009). Enforcement of the clauses is advocated based on the long-standing principle that the intent of the settlor should be given effect. Id. At the same time, equity does not favor forfeiture, thus courts have generally construed such clauses narrowly. Id. For example, where a beneficiary brings or joins in an action to construe a trust instrument, courts have consistently concluded that the forfeiture clause is not triggered, reasoning that the beneficiary is not attempting to set aside the trust or invalidate any of its provisions, but rather, is an interested party seeking judicial guidance to give effect to the settlor’s intent. Likewise, when the trustee’s administration or management of the trust is called into question, a no-contest clause is generally not triggered. Id.

The validity of a particular clause will likely depend on the grounds asserted for invalidity. Id. For example, if it is alleged that a particular disposition violates the Rule of Perpetuities, forfeiture is unlikely, even if the suit is not successful where probable cause exists. In addition, the type of conduct constituting a violation of the clause may be relevant. Simply seeking judicial construction of a clause generally does not rise to the level of a “contest,” nor does challenging the trustee’s administration or management of the trust estate. Id. The rationale for refusing to enforce the clause under these circumstances is premised on the court’s
view that such actions by a beneficiary are not an attempt to undermine the testator’s intent, and enforcement would not serve the purpose of the clause. *Id.*

Scott and Ascher on Trusts comes to the same conclusions as Bogert, providing that no-contest clauses are generally unenforceable and contrary to public policy to the extent the clauses purport to relieve a trustee of his or her duties or have the affect of relieving a trustee of his or her duties. Scott and Ascher on Trusts, § 9.3.14

**CALIFORNIA**

(Robert N. Sacks and Gary Mitchell Ruttenberg)

New legislation has recently become effective in California, resulting in significant changes in the no-contest arena. On January 1, 2010, a new statutory framework went into effect to completely change California law for no-contest clauses for all instruments that became irrevocable on or after January 1, 2001. (Prior California law still governs instruments that became irrevocable before January 1, 2001). Therefore, California is currently operating under two regimes.

Under the old system, applicable to instruments that become irrevocable prior to January 1, 2001, no-contest clauses are valid and enforceable in the State of California (with a myriad of exceptions). Probate Code Section 21303 provides that, with certain exceptions, “a no-contest clause is enforceable against a beneficiary who brings a contest within the terms of a no-contest clause.” Also in accordance with Probate Code Section 21304, “a no-contest clause shall be strictly construed.”

The term “contest” is defined by statute, Probate Code Section 21300 (a), to mean “an attack in a proceeding on an instrument or on a provision in an instrument.” The term “no-contest clause” is defined in Probate Code Section 21320 (b) to “mean a provision in an otherwise valid instrument that, if enforced, would penalize a beneficiary if the beneficiary brings a contest.”

The codification as set forth in Probate Code Section 21300 *et seq.* is, in accordance with Probate Code Section 21301, “not intended as a complete codification of the law governing enforcement of a no-contest clause.” It further provides that the “common law governs enforcement of a no-contest clause to the extent [the statutes do] not apply.”

Under the old regime, which still governs instruments that became irrevocable before January 1, 2001, various exceptions to the enforcement of a no-contest clause are provided by statute:

Probate Code Section 21305 creates two classes of actions/proceedings eliminating or limiting the effectiveness of no-contest clauses:

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1 California law references “instruments,” which the California Probate Code defines as “a will, trust, deed, or other writing that designates a beneficiary or makes a donative transfer of property.” Cal. Probate Code Section 21310.