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COVER STORY

Contesting the No Contest Clause

California's Trust and Estate Bar Complains of Increased Litigation

By Rebecca Beyer
Daily Journal Staff Writer

SAN FRANCISCO — Where there's a will — and a no contest clause — there's way too much litigation.

At least, that's the view shared by many attorneys who practice within the trust and estate bar in California.

A no contest clause is the ultimate take-it-or-leave-it mechanism. With it, the person who sets up a will or trust can punish beneficiaries who challenge the terms of the will or trust. In essence, if a beneficiary contests the terms of his gift, he forfeits the gift.

The logic behind no contest clauses is that they limit litigation from disappointed family members and friends who feel jilted. They are a step someone can take so that, after his or her death, those on the other side of the grave can rest in peace. But the clauses are the source of controversy in the state, pitting the wishes of the dead against the expectations of survivors.

"This area tends to be somewhat fraught with emotion even though it's what I call manna from heaven - nobody's going out of pocket here; it's how you split a gift," said David W. Baer, chair of Hanson Bridgett's trust and estate litigation practice in San Francisco.

Under California law, many attorneys say, no contest clauses actually increase litigation. And they have the statistics to prove it.

The California Supreme Court first held that no contest clauses were enforceable in 1909. Between that year and 1991, only 17 reported appellate or state Supreme Court decisions dealt with no contest clauses — one reported case every four years and nine months.

Between 1992 and 2007, there were 26 reported cases — one reported case every six months.

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"This area seems to be somewhat fraught with emotion even though it's what I call manna from heaven — nobody's going out of pocket here; It's how you split a gift," said attorney David W. Baer.

James P. Lamping, an attorney with Gaw Van Male in Napa, put together the list of no contest cases for the executive committee of the Trusts and Estates Section of the State Bar. Lamping said the results were not surprising because the bar had noticed — if not quantified — the increase already.

According to the committee, the main reason for the increased litigation is a step the state Legislature took to alleviate confusion over contests.

In 1991, state law began to allow beneficiaries to file declaratory relief petitions with the court to determine whether a pleading is a contest. California is the only state that allows the petitions.

"The declaratory relief procedure permits people what I call a free look," said John A. Hartog, a trust and estate attorney based in Orinda.

Hartog said that, because in deciding petitions judges are not enforcing forfeiture (they are just warning of its looming possibility), they are sometimes "freer" in finding that something is a contest. The result is that similar situations can yield different conclusions on the law. That, in turn, makes for a very confused bar.

The petitions also take time, and they are almost always appealed.

"This safe harbor provision has become a vehicle for one side or another to delay a case for a year or more at the outset," Baer said. "That's a problem."

Oakland attorney Neil F. Horton, of Horton & Roberts in Oakland, agreed.

Horton recently wrapped up a case in which he represented a client who was

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challenging an amendment to a trust. The family trust had a substantial amount of land that the beneficiaries were interested in developing.

But it took two years for Horton's declaratory relief petition to make its way through the courts. By the time the answer came down, the real estate market had crashed.

In the end, Horton's petition was not a contest; the parties were right back where they began.

"If we could have resolved it more quickly, they would have made a lot more money than they're going to make now," Horton said.

He said other reasons, like a rapidly expanding elderly population with a growing accumulation of wealth, contribute to the increased litigation. Still, many attorneys point to declaratory relief petitions as the most likely cause of the rise in litigation.

Not all attorneys agree the petitions are bad, however.

Edward Corey Jr., of Weintraub Genshlea Chediak in Sacramento, said he appreciates the safe harbor provision.

"You get a free pass with the court," Corey said. "You can say, 'I want to bring this petition; tell me, if I bring this petition, will it be a contest?'"

Corey, like Baer, Horton and Hartog, is on the executive committee of the Trusts and Estates Section of the State Bar. He said he agrees that the petitions delay the process but said that they provide some much-needed clarity for a "confusing, highly convoluted" statute.

California Sen. Tom Harman, R-Costa Mesa, has introduced legislation that would simplify the laws governing no contest clauses, but the majority of the committee doesn't think the bill goes far enough. The committee voted to support the bill only if it were amended to, among other things, eliminate declaratory relief.

In 2005, the committee had asked the Legislature to do something much more drastic: make no contest clauses unenforceable altogether. Only two states, Florida and Indiana, take that position. Most states follow the Uniform Probate Code, which provides a probable cause exception to the enforcement of a no contest clause.

But the California Legislature balked. It had made changes to the laws, like allowing probable or reasonable cause exceptions in certain cases and making some clauses unenforceable as a matter of public policy. Before legislators made more changes, they wanted to know what was wrong. They asked the California Law Revision Commission to study the advantages and disadvantages of enforcing no contest clauses. As part of that study, the commission surveyed members of the trust and estate bar and elder law attorneys (the latter have concerns about how the clauses can be used to manipulate an elderly person's estate).

According to a recommendation from the commission issued in January, the most common and serious problem reported by the attorneys is uncertainty over whether something is or is not a contest.

The second-most-common and serious problem is the cost and delay associated with declaratory relief, the mechanism the Legislature created to deal with the first problem.

The controversy over no contest clauses arises in the effort to strike a balance between the wishes of the dead and the need for people to have access to the courts to address a perceived wrong or injustice.

"You can't be perfect here," Baer said. "Whichever need you consider more significant, there will be some downside. It's very hard just with words in a statute to keep in the good suits and throw out the bad ones. It's an unending problem that we face."

Changes to the laws in the past have only made the matter more complicated, Baer and others said, because they created definitive periods that determine how a document should be treated. No contest clauses in wills or trusts valid before 2000, between 2001 and 2003, and after 2003 are subject to different sets of laws.

"If something should be unenforceable, it should be unenforceable whenever someone dies," Baer said. "Public policy did not change when the clock struck Jan. 1, 2001, or again when the clock struck Jan. 1, 2003."

Harman's proposed legislation, sponsored by the California Law Revision Commission and written on the group's recommendations, would simplify and clarify current law. It would narrow the scope of declaratory relief and expand the probable cause exceptions. The bill is set for a hearing before the state Senate Judiciary Committee March 25, according to a representative from Harman's office.

The executive committee of the Trusts and Estates Section of the State Bar voted to support the bill if it were amended to eliminate declaratory relief, apply no contest clauses only to beneficiaries who lack probable cause and apply the new laws retroactively.

In other words, most members agree the legislation will help but that it doesn't quite do enough.

"The committee thinks it's better to have the legislation pass than not and better yet if it's amended," Baer said. "Despite the best efforts of the Legislature and our own committee to help define what should and should not be a contest, there has been a high degree of unpredictability and uncertainty here."

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